# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

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No. 563

## INTERSTATE COMMERCE COMMISSION, APPELLANT,

vs.

## J-T TRANSPORT COMPANY, INC., ET AL.

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No. 564

## U.S.A.C. TRANSPORT, INC., ET AL., APPELLANTS,

vs.

## J-T TRANSPORT COMPANY, INC., ET AL.

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APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

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[fol. 1] [File endorsement omitted]

**IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION**

Civil Action File No. 12497

J-T TRANSPORT COMPANY, INC., Plaintiff,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Defendants

COMPLAINT—Filed August 21, 1959

Comes now J-T Transport Company, Inc., a corporation, plaintiff herein, and for cause of action respectfully shows to the Court:

I

Jurisdictional Statement

This is an action:

(1) To enjoin, annul, and set aside orders of the Interstate Commerce Commission dated January 31, 1958, and June 15, 1959, issued in Docket No. MC-11185 (Sub-No. 102) *J-T Transport Company, Inc.—Extension—Indianapolis, Indiana*, copies of which orders are attached hereto and made a part hereof as appendices "B", and "D", respectively.

(2) To compel action by the Interstate Commerce Commission unlawfully withheld upon the application of plaintiff in Docket No. MC-11185 (Sub-No. 102) *J-T Transport Company, Inc.—Extension—Indianapolis, Indiana*, which application is described in Appendix "A" hereto.

This action arises under the provisions of Section 205(g) of the Interstate Commerce Act, 49 USCA 305(g), Section 10 of the Administrative Procedure Act, 5 USCA 1009, and Sections 1336, 1398, 2284, and 2321 to 2325, inclusive, of the Judicial Code, 28 USCA 1336, 1398, 2284 and 2321 to 2325, inclusive.

The United States of America is named as a defendant

pursuant to Section 2322 of the Judicial Code, 28 USCA 2322.

[fol. 2] II

Parties

J-T Transport Company, Inc., is a corporation, organized and existing under and by virtue of the laws of the State of Missouri, with its headquarters and principal place of business located at 3501 Manchester Trafficway, Kansas City, Missouri. Said J-T Transport Company, Inc. for a number of years has been engaged, pursuant to authority of the Interstate Commerce Commission, in the transportation, as a contract carrier by motor vehicle, over irregular routes, of uncrated airplane parts and equipment requiring special handling and equipment, between a number of points in the west and mid-west, and in so doing has conducted a substantial operation.

Also, as will be more fully hereinafter set forth, since the 5th day of August, 1957, the plaintiff has held temporary authority from the Interstate Commerce Commission in Docket No. MC-11185 (Sub-No. 103TA) to transport, as a contract carrier by motor vehicle, over irregular routes, aircraft assemblies, uncrated, requiring special handling and equipment because of fragile nature, from Indianapolis, Indiana, to Wichita, Kansas, and since such date has been actively engaged in performance of the transportation authorized thereby. The transportation which plaintiff has performed under temporary authority is that covered by the application for permanent authority in Docket No. MC-11185 (Sub-No. 102). Such temporary authority was terminated by the Interstate Commerce Commission following issuance of its order of July 25, 1958 in Docket No. MC-11185 (Sub-No. 102), but plaintiff is advised that by virtue of subsequent developments, upon the filing hereof plaintiff may continue to perform such transportation under temporary authority pending final adjudication of the issues presented herein.

The Interstate Commerce Commission is an administrative agency of the Federal Government established under and by virtue of the Interstate Commerce Act, as amended, said Act appearing in Title 49 of the United States Code Annotated.

The Congress has provided in Section 209(b) of the Interstate Commerce Act, 49 USCA 309(b), that the Commission shall issue a permit to any qualified applicant [fol. 3] for authority to operate as a contract carrier authorizing, in whole or in part, the operations covered by the application, if it appears that the applicant is fit, willing and able properly to perform the service of a contract carrier by motor vehicle, to conform to the provisions of the Act and the lawful requirements, rules and regulations of the Commission, and that the proposed operations will be consistent with the public interest and the National Transportation Policy declared by the Act.

Substantial amendments were made to portions of the Interstate Commerce Act relating to contract carriers by motor vehicle and the powers and duties of the Interstate Commerce Commission with respect thereto by Senate Bill No. 1384 of the 85th Congress, Public Law 85-163, 71 Stat. 411. Such amendments are of particular pertinence to the issues in this litigation, and for convenience are here reproduced, as follows:

Paragraph (15) of Section 203(a) of the Interstate Commerce Act (49 USCA 303(a) (15) is changed to read as follows:

> "(15) The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer."

In the next place, Section 209(b) of the Act (49 USCA 309(b)) was amended by inserting after the second sentence of said Section 209(b) a new sentence to read as follows:

> "In determining whether issuance of a permit will be consistent with the public interest and the national

transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements."

[fol. 4] Said Section 209(b) (49 USCA 309 (b)) was further amended by changing the third sentence thereof to read as follows:

"The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier, including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirements established by the Commission under Section 204(a) (2) and (6): *Provided*, That within the scope of the permit and any terms, conditions or limitations attached thereto, the carrier shall have the right to substitute or add to its equipment and facilities as the development of its business may require; *Provided, Further*, That no terms, conditions or limitations shall be imposed in any permit issued on or before the effective date of this proviso which shall restrict the right of the carrier to substitute similar contracts within the scope of such permit; or to add contracts within the scope of such permit unless upon investigation on its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in Section 203(a) (15), as in force on and after the effective date of this proviso."

The foregoing amendments became effective on August 22, 1957.

## III

### Statement of the Case

On March 14, 1957, J-T Transport Company, Inc. filed with the Interstate Commerce Commission an application for a permit which would authorize it to operate, as a contract carrier by motor vehicle, over irregular routes, in the transportation of aircraft assemblies, uncrated, requiring special handling and equipment because of fragile nature, from Indianapolis, Indiana to Wichita, Kansas. The application was filed at the behest of Boeing Airplane Company, which Company, insofar as here pertinent operates a plant at Wichita, Kansas for the manufacture of airplanes for the U. S. Government. In conjunction with the application for permanent authority, as aforesaid, the plaintiff, at the request of Boeing Airplane Company, filed an application for temporary authority to perform the same transportation on a temporary basis. In the exercise of the power [fol. 5] conferred upon the Commission by Section 210(a) of the Interstate Commerce Act (49 USCA 310(a)) to grant temporary authority where there is an immediate and urgent need for service in a territory having no carrier service capable of meeting such need, after appropriate investigation the Commission did grant to plaintiff such temporary authority, under which plaintiff has been performing the involved transportation. Such authority has been extended from time to time and, plaintiffs are advised and aver, upon the filing hereof it may continue to perform such transportation, inasmuch as the issues involved have not yet been finally determined.

The primary purpose of the application was to permit plaintiffs to transport "landing gear bulkheads" from the point of manufacture in Indianapolis to the plant of Boeing Airplane Company in Wichita, Kansas, such transportation to be performed solely for Boeing Airplane Company as a contract carrier, and by petition for reconsideration filed with the Interstate Commerce Commission by plaintiffs on April 14, 1958, it was agreed that the application, which originally contained a broader commodity description, might be considered to be so amended and restricted.

The application was heard at Denver, Colorado on May 22, 1957 by an experienced examiner of the Interstate Com-

merce Commission who filed his recommended report and order on July 18, 1957, wherein he found that the proposed operation by plaintiff would be consistent with the public interest and the National Transportation Policy; that plaintiff was fit, willing and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and the rules and regulations thereunder, and that a permit authorizing such operation should be granted.

The report of the examiner contained a comprehensive and carefully prepared statement of facts, and such report is attached as Appendix "A" hereto. As will be noted from Page 3 of Appendix "B", the Commission later adopted the examiner's statement of facts in holding:

> "We find the statement of facts contained in the examiner's reports to be accurate in all respects; and, as hereafter amplified or restated for clarity of discussion, we adopt such statements as our own."

The Commission used the plural in that the Commission, in Appendix "B", was dealing with two separate and dis-
[fol. 6] tinct applications. We are here concerned only with that portion of the appendix relating to Docket No. MC-11185 (Sub-No. 102).

At the hearing before the examiner three motor common carriers and one rail carrier submitted evidence in opposition to the application. Two of these motor carriers were so-called "heavy haulers and riggers". They filed no exceptions to the examiner's recommended report and order. The rail carrier excepted to the examiner's report only insofar as the commodity description was concerned, taking the position that the commodity should be described as "landing gear bulkheads", to which descriptions plaintiffs have agreed, as aforesaid.

Plaintiffs aver, therefore, that the only opposition to their application when same was considered by the Interstate Commerce Commission was that of one motor *common* carrier which held authority to operate, over irregular routes, in the transportation of aircraft parts, crated or uncrated, restricted to parts requiring special equipment or handling by reason of size, weight or fragile character, which carrier was authorized, as a common carrier, to transport the commodity between the points involved in

this application, but which have never performed such transportation.

In due course the motor common carrier referred to above filed exceptions to the recommended report and order of the examiner dated July 18, 1957, to which J-T Transport Company, Inc. replied on September 16, 1957.

On January 31, 1958, Division 1 of the Interstate Commerce Commission, with one Commissioner absent and not participating, acting as an Appellate Division, handed down a report and order embracing in the one report and order its action on two separate applications heard on separate records. Copy of said order is attached as Appendix "B", but it should be noted that the only portion thereof with which we are here concerned is that relating to No. MC-11185 (Sub-No. 102) *J-T Transport Company, Inc.—Extension—Indianapolis, Indiana.*

The effect of the Division order was to deny to plaintiff authority to perform the involved transportation *as a contract carrier* because one *common carrier* held authority to perform the transportation as such, which carrier had never performed any such transportation, but expressed a willingness so to do as a *common carrier.*

[fol. 7] The conclusion of Division 1 appears on Page 5 of Appendix "B", as follows:

> "The burden is upon an applicant seeking contract carrier authority, as well as one seeking common carrier authority, to establish, among other things, that there is a need for the service proposed which existing carriers cannot or will not meet . . . A service not needed cannot be found consistent with the public interest or the national transportation policy."

On April 14, 1958, the Aircraft Industries Association of America filed a petition for leave to intervene in said cause, and a petition for reconsideration by the entire Commission of the Division 1 report and order, and for oral argument.

On April 14, 1958, the Contract Carrier Conference of American Trucking Associations, Inc. filed a petition for leave to intervene and a petition for reconsideration by the entire Commission of the Division 1 report and order.

In due course, on April 14, 1958, J-T Transport Company, Inc. filed a petition for reconsideration by the entire Com-

mission of the report and order of Division 1 aforesaid, and for oral argument before the entire Commission.

The one motor common carrier referred to above responded to such petitions, with the result that on July 25, 1958, the Commission handed down its final order, Appendix "C" hereto, allowing the petitions for leave to intervene and denying the petitions of reconsideration and for oral argument.

Thereby plaintiff, having exhausted its administrative remedies, on August 18, 1958, in Civil Action No. 12010 in this Honorable Court, plaintiff filed its complaint challenging validity of the orders of the Commission dated January 31, 1958, and July 25, 1958, upon the grounds that same were unreasonable, arbitrary, capricious, unlawful, an abuse of discretion, in excess of statutory authority and short of statutory right for the various reasons assigned in the complaint. The cause was styled *J-T Transport Company, Inc., plaintiff*, v. *United States of America and Interstate Commerce Commission, defendants.* Injunctive relief was prayed, and it was prayed that judgment and decree be entered setting aside the aforesaid orders of the Commission and declaring same unlawful and void, and [fol. 8] ordering and directing the Commission to issue to plaintiff a permit authorizing it to perform the transportation recommended by the report and order of July 18, 1957, (Appendix "A" hereto), with the commodity description changed to "landing gear bulkheads", to which plaintiff had agreed in its petition for reconsideration.

Subsequently, and before the filing of answer on behalf of either the United States of America or the Interstate Commerce Commission, Division 1 handed down a report in another proceeding which appeared, upon the face thereof, to be diametrically opposed, in material respects, to the report of January 31, 1958, (Appendix "B" hereto). Whereupon, plaintiff tendered to the Interstate Commerce Commission another petition for reconsideration which the Commission, by order of date of October 16, 1958, accepted for filing, vacating its previous order of July 25, 1958, and reopening the proceeding for consideration on the present record and issuance of a further report and order of the Commission. A true and correct copy of the order of October 16, 1958, is attached hereto as Appendix "E".

The Commission, having reopened the proceeding for further administrative action, by agreement of the parties, an order was entered in Cause No. 12010, permitting plaintiff to take a voluntary nonsuit without prejudice.

The motor common carrier which had opposed plaintiff's application throughout filed response to the petition for reconsideration and, by appropriate orders of the Commission, the Regular Common Carrier Conference of American Trucking Associations, Inc., and the Common Carrier Conference—Irregular Route, American Trucking Associations, Inc., were granted leave to intervene.

The matter was held under advisement by the Interstate Commerce Commission until June 15, 1959, at which time, by a split decision, with only eight commissioners participating, the Commission handed down its order, incorporating its report of January 31, 1958 therein, and denying the application upon the same grounds contained in the report of January 31, 1958. The report and order of June 15, 1959, served on June 25, 1959, is attached hereto as Appendix "D", and, as is obvious therefrom, same constitutes nothing more nor less than an extended argument in support of an effort to bolster the report and order of January 31, 1958.

Plaintiff has again exhausted its administrative remedies.

[fol. 9]

## IV

### Allegations of Error

The orders of the Interstate Commerce Commission of January 31, 1958 and June 15, 1959 (Appendices "B" and "D" hereto), reversing the recommended report and order of the Examiner (Appendix "A" hereto), denying the relief sought by the petitions for reconsideration of plaintiff and interveners and refusing to approve plaintiff's application are unreasonable, arbitrary, capricious, unlawful, an abuse of discretion, are in excess of statutory authority, and short of statutory right for the following reasons:

(1) Said orders do not include an adequate statement of findings, as well as the reasons and bases thereof, upon all the material issues of fact, law, or discretion presented on the record and are not supported by substantial evidence but, to the contrary, are in direct conflict with and in disregard of the great preponderance of the evidence.

(2) Said orders are predicated solely upon conclusions, as distinguished from findings, which find no support in the record.

(3) Said orders result from the failure and refusal of the Commission properly to interpret and apply the Interstate Commerce Act, 49 USCA Sections 301 et seq., as amended, as well as decisions of the Interstate Commerce Commission and of the Courts rendered thereunder, and same arise from a wholly erroneous construction and application of such Act.

(4) Said orders recognize, create and maintain a monopoly in one form of motor carrier transportation and in one carrier contrary to the authority vested in the Commission by the Interstate Commerce Act, the express purpose and intent of said Act, the express purpose and intent of the National Transportation Policy as enunciated by Congress (note preceding Section 301, Title 49, USCA), and the decisions of the Commission and of the Courts in construction thereof.

(5) Said orders are tantamount to a determination that irrespective of whether issuance of a contract carrier permit would be consistent with the public interest the Commission will not issue a contract carrier permit if there exists a common carrier with a certificate permitting performance, as a common carrier, of the involved transportation.

(6) Said orders, contrary to the Interstate Commerce Act, as amended, would require an applicant for a permit [fol. 10] as a contract carrier to meet the prerequisites prescribed by Congress for an applicant for a common carrier certificate before a contract carrier's permit would be issued.

(7) Said orders place an interpretation and construction upon Section 203(a) (15) of the Interstate Commerce Act (49 USCA 303(a) (15)) and Section 209(b) of the Act (49 USCA 309(b)), as amended, contrary to the intention of Congress as evidenced by the legislative history of Senate Bill 1384 of the 85th Congress (Public Law 85-163; 71 Stat. 411).

(8) Said orders constitute an attempt by the Commission to do by legislative construction that which it could not accomplish before the Congress by way of proposed amend-

ment to the Act. When Senate Bill 1384 was before the Committee on Interstate and Foreign Commerce, one amendment proposed to Section 209(b) by the Interstate Commerce Commission included a provision that a contract carrier permit would be issued when it appears, among other things, "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown." The Commission was repulsed in its effort to procure such amendment but, nevertheless, by the orders attacked herein the Commission would read such amendment into the Act by legislative construction and deny to plaintiff the permit sought upon the sole ground that a common carrier, as a common carrier, expresses a willingness to provide the service for which a need for contract carriage has been shown.

(9) Said orders, contrary to the record, do not include an adequate statement of findings, and are short of statutory right in that they do not find and hold that plaintiff, under a continuing contract with one person will (a) furnish transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of such person and (b) furnish transportation services designed to meet the distinct needs of each individual customer.

(10) Said orders, contrary to the record, are not based on adequate statement of findings, and are short of statutory right in that same result from the failure and refusal of the Commission to consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the [fol. 11] services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements.

(11) Said orders contravene the National Transportation Policy as enunciated by Congress (note preceding Section 301, USCA, Title 49) in that they do not constitute fair and impartial regulation of all modes of transportation nor administration of the Interstate Commerce Act so as to recognize and preserve the inherent advantages of each; nor do they promote safe, adequate, economical and efficient service and foster sound economic conditions in

transportation and among the several carriers; nor do such orders tend to develop, coordinate and preserve a national transportation system adequate to meet the needs of the commerce of the United States and of the national defense; but, to the contrary, said orders do and will thwart all of the objectives of such National Transportation Policy.

(12) By said orders the Commission has unlawfully withheld rights to which plaintiff is entitled.

All as provided by Section 9(e) of the Administrative Procedure Act, 5 USCA 1009(e).

## V

### Injury to Plaintiffs

Plaintiff would respectfully show to the Court that it has been the victim of unlawful action and abuse of discretion by the Interstate Commerce Commission in the effort of the Commission, as is so often the case with administrative agencies of late, to circumvent the express mandate of Congress, violate all rules of statutory construction and accomplish by administrative construction of legislative enactment that which it could not accomplish before Congress and that which was repudiated by Congress.

As is established by the record in this proceeding, the plaintiff, a highly specialized contract carrier, has worked closely in collaboration with Boeing Airplane Company to provide a much needed transportation service for expensive, delicate and difficult to handle airplane parts which must be moved on tight schedule from Indianapolis to Wichita with such precision as to fit into assembly line operations. In so doing the plaintiff has expended its time, [fol. 12] effort and funds in designing and procuring specialized equipment for the performance of such transportation, has employed and trained capable and experienced personnel, and has, under temporary authority, adequately and satisfactorily filled the needs of the shipper. In so doing it is performing a service no other contract carrier has authority to perform, a service which no common motor carrier has performed, and one which the rails cannot as expeditiously and efficiently perform.

By virtue of the orders of the Commission the plaintiff will, of course, lose its investment in facilities and equip-

ment as well as the revenue reasonably to be anticipated from the transportation, but the injury to plaintiff, serious though it may be to plaintiff, is of somewhat smaller proportions than the injury to the public at large, the United States Government, to shippers and to motor contract carriers.

The shipper supporting the instant application, as disclosed by the record, is producing airplanes for the United States Government, and its production schedule cannot be met unless it has available to it a contract carrier transportation service such as that plaintiff has been and proposes to perform.

In the next place, by way of petition for leave to intervene and for reconsideration of the Commission's order the Aircraft Industries Association of America, Inc. represents that its membership produces approximately 95% of the aircraft manufactured in the United States, and that its membership is grievously injured by the implications of the action of the Commission plaintiff's application; and, as well, by petition for leave to intervene and for reconsideration the Contract Carrier Conference of the American Trucking Associations, Inc. demonstrates its interest and concern at the unlawful action of the Commission.

As the record will disclose, the plaintiff in this case has met all the prerequisites of Sections 203(a)(15) and 209(b) (49 USCA Sections 303(a) (15) and 309(b) of the Interstate Commerce Act, as amended, for the issuance of a contract carrier's permit. The Commission, however, has seen fit to ignore the mandate of Congress and substitute requirements and criteria not contained in said Act, and to destroy the distinction between common and contract motor carriage, and upon such it predicates the unlawful orders here attacked.

[fol. 13] By the reports and orders here attached the Commission has added to the five enumerated tests of section 209(b) of the Act a sixth test, i.e., that in each contract carrier application the burden is on the applicant to show that protesting common carriers are unwilling or unable to meet the shippers' reasonable transportation requirements. Such requirement is not supported by the language of Public Law 85-163, or by the pertinent legislative history.

When the bill (S.1384) which became Public Law 85-163

was introduced, it amended section 203(a)(15) of the Act so as to define a contract carrier as one who conducts its business other than as a common carrier and—

> ". . . under continuing contracts with one person or a limited number of persons for the furnishing of transportation services of a special and individual nature required by the customer *and not provided by common carriers.*"

The Senate Committee on Interstate and Foreign Commerce deleted the language underscored above. In addition, the Committee eliminated from the bill the requirement of a showing under section 209(b) "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown." In place of the language last quoted, the committee directed the Commission to consider "the effect which granting the permit would have upon the services of the protesting carriers". As thus amended, the bill was enacted into law.

Contract carriers opposed the bill as originally introduced on the ground that to require proof as to the nonexistence of adequate common carrier service would prevent extension of, if not destroy, contract carrier service. The Department of Commerce agreed and the Congress agreed. The Interstate Commerce Commission, however, by its reports, attempts to write into sections 203(a)(15) and 209(b) language deliberately stricken by the Congress. The test formulated by the Commission in its reports and the test which would have been prescribed by the language deleted from the bill by Congress are essentially one and the same, and such test is, perforce, illegal and unwarranted administrative legislation.

[fol. 14]

## VI

## Prayers for Relief

Wherefore, Premises Considered, plaintiff respectfully prays:

1. That this, its complaint, be filed and that all proper process issue and be served upon the defendants requiring them to appear and answer this complaint.
2. That upon hearing hereof a judgment and decree enter

herein setting aside the aforesaid orders of the Interstate Commerce Commission and declaring same unlawful and void, and ordering and directing the Interstate Commerce Commission to issue to plaintiff a permit authorizing it to perform the transportation recommended by the report and order of July 18, 1957 (Appendix "A" hereto), with the commodity description changed to "landing gear bulkheads" to which plaintiffs agreed in their petition for reconsideration.

3. That in accordance with Section 2284.1 of Title 28 of the United States Code, this Court immediately notify the Chief Judge, or in his absence the Senior Judge, of the United States Court of Appeals for the Eighth Circuit to designate two other judges, at least one of whom shall be a Circuit Judge, to serve as members of the Court to hear and determine this action.

4. And plaintiff prays for such other, further and general relief to which it, in the premises may be entitled.

James W. Wrape, Glenn M. Elliott, 2111 Sterick Building, Memphis, Tennessee. James F. Miller, 500 Board of Trade Building, Kansas City, Missouri. Attorneys for Plaintiff.

Of Counsel: Wrape and Hernly, 2111 Sterick Building, Memphis, Tennessee and 1624 Eye Street, N.W., Washington, D. C.

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[fol. 15] Duly Sworn to by Thom Cooper (Jurat omitted in Printing).

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[fol. 16] APPENDIX "A" TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

Served Notice to the Parties

Exceptions, if any, must be filed with the Secretary, Interstate Commerce Commission, Washington, D. C., and served on all other parties in interest, within 30 days from the date of service shown above, or within such further period as may be authorized for the filing of exceptions. At the expiration of the period for the filing of exceptions, the attached order will become the order of the Commission

and will become effective unless exceptions are filed seasonably or the order is stayed or postponed by the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due. If the exceptions are filed, replies thereto may be filed within 20 days after the final date for filing exceptions.

Any new operation to be authorized by the recommended order herein if it becomes effective may not be commenced until such time as the certificate, permit, or license has actually been issued. The certificate, permit, or license will not be issued until the applicant has complied with the provisions of the Interstate Commerce Act and the requirements of the Commission thereunder. It should not be assumed that the recommended order has become effective as the order of the Commission until a notice to that effect, signed by the Secretary of the Commission, has been received.

No. MC-111835 (Sub-No. 102)

J-T Transport Company, Inc., Extension—Indianapolis, Ind.

Decided ——— —, ——

1. Operation by applicant as a contract carrier by motor vehicle, over irregular routes, of aircraft assemblies, uncrated, requiring special handling and equipment because of fragile nature, from Indianapolis, Ind., to Wichita, Kans., found consistent with the public interest and the national transportation policy.

2. Dual operations approved.

3. Issuance of a permit approved upon compliance by applicant with certain conditions, and application in all other respects denied.

*James W. Wrape* for applicant.

*Douglas McHendrie, Paul F. Sullivan* and *Ernest A. Brooks, II*, for protestants.

Report and Order

*Recommended by Leo W. Cunningham, Examiner*

By application filed March 14, 1957, J-T Transport Company, Inc., of Kansas City, Mo., seeks a permit authorizing operation, in interstate or foreign commerce, as a contract

carrier by motor vehicle, over irregular routes, of aircraft assemblies, uncrated, requiring special handling and equipment because of fragile nature, from Indianapolis, Ind., to Wichita, Kans.

The application was referred to the examiner for hearing and the recommendation of an appropriate order thereon. Hearing was held on May 22, 1957 at Denver, Colo. Rail carriers in the involved area and seven motor common carriers oppose the granting of the application.

[fol. 17] Applicant, as pertinent herein, now holds authority to operate as a contract carrier by motor vehicle, over irregular routes, of uncrated airplane parts and equipment requiring special handling and equipment, (except airplane engines, (1) from Grand Prairie, Tex., to Burbank, Calif., (2) from Burbank and Manhattan Beach, Calif., Brady and Grand Prairie, Tex., and Utica and Detroit, Mich., to Wichita (4) between Garland and Grand Prairie, Tex., and on the one hand, and, on the other, St. Louis, Mo., and (5) between Litchfield Park, Ariz., and Columbus, Ohio. It also holds temporary authority for 120 days beginning April 9, 1957 to operate as a contract carrier by motor vehicle, over irregular routes, of landing gear bulkheads, uncrated, requiring special equipment and special handling, from Indianapolis to Wichita. Applicant operates 33 tractors and 45 trailers. The trailer which it is using from Indianapolis to Wichita under its temporary authority and which it will use in the proposed operation if the authority sought is granted was specially constructed. It is 35 feet long, 12 feet 6 inches high and 8 feet wide. It has an underslung frame and an electric elevator is built in the trailer which operates with cables to raise and elevate the floor from the underslung part of the trailer up even to the rear wheels so that an airplane part can be rolled in or out. The roof also raises up and down with the elevator. Special floor racks move with the trailer for the loading and unloading of airplane parts. A terminal is maintained at Wichita.

Applicant's balance sheet as of April 30, 1957, shows current assets of $162,744, current liabilities of $78,333, and surplus of $240,801. Its net profit for the first 4 months of 1957 was $7,664. Applicant is fit and able, financially and otherwise, to perform the proposed operation.

Applicant has two affiliated motor carriers under common control, namely, Jack Cooper, Jr., and Thom Cooper, a partnership, doing business as J-T Transport Company, which has authority to operate as a common carrier, over irregular routes, of automobiles and trucks, in initial movements from Detroit and points in that area to certain points in Kansas and Missouri, and Jack Cooper Transport Company, Inc., which holds authority to operate as a contract carrier by motor vehicle, over irregular routes, (1) of automobiles, trucks, and buses, in initial movements, from Kansas City to points in several States, and (2) automobiles, trucks and buses, in secondary movements, between points in 14 western States.

Boeing Airplane Company supports the application. As pertinent herein, it operates a plant at Wichita for the production of airplanes. It has been using applicant's service to transport landing gear bulkheads from Indianapolis to Wichita for about 4 months to the extent of about 4 loads a month. A load consists of 4 landing gear bulkheads, each weighing about 1380 pounds. The bulkheads are made of aluminum, titanium and magnesium and extreme care must be used for their transportation. Each one is worth about $24,000. Applicant's one piece of equipment as above described was made for the exclusive use of this shipper for the operation involved herein and such equipment is necessary to adequately handle its transportation requirements from Indianapolis to Wichita. Applicant now serves this shipper and works closely with it on its transportation problems and since it has a terminal at Wichita its equipment can be furnished on short notice. The bulkheads must move in an expedited service as they must be at the plant when they have to be installed at a certain specified time. Prior to the use of applicant's service rail service was used but the cost of constructing special containers made this service prohibitive. Although in the past only landing gear bulkheads have moved other airplane parts may move in the future.

The record shows that there is interline rail service from Indianapolis to Wichita and that they are in a position to handle additional traffic.

Three motor common carriers submitted evidence in opposition to the application as pertinent herein. U. S. A.

C. Transport, Inc., operates, over irregular routes, for the transportation of aircraft parts, crated or uncrated, restricted to parts requiring special equipment or handling by reason of size, weight, or fragile character, between points in the United States east of the Mississippi River, on the one hand, and, on the other, points west of the Mississippi River. It operates 115 tractors and 227 trailers [fol. 18] and maintains terminals at Indianapolis, Dallas, Tex., and Topeka, Kans., among other points. It has handled numerous shipments of airplane parts which because of size or weight have required special handling or equipment from and to points not involved herein. It claims that if its equipment is not suitable for the transportation requirements of the shipper herein it will construct any type of equipment that is needed.

Belger Cartage Service, Inc., operates over irregular routes, for the transportation of heavy machinery and such commodities as require the use of special equipment by reason of size or weight, between points in Missouri and Kansas. It has solicited the shipper for traffic but has never received any. Daniel Hamm Drayage Company operates, over irregular routes, for the transportation of commodities, the transportation of which, because of size or weight, require the use of special equipment, between points in Indiana and Missouri. By an interline arrangement at Kansas City these two motor carriers contend that they could handle the traffic herein. Hamm claims to have some equipment that could be used to satisfy the shipper's needs from Indianapolis to Wichita. All of the above-named three motor carriers are in a position to handle additional traffic.

Summarizing briefly, one shipper supports the application. As concerned herein, it now is using applicant's service under temporary authority from Indianapolis to Wichita. Applicant has constructed a special unit of equipment as hereinbefore described to handle the shipper's traffic as herein involved and such equipment is dedicated to the exclusive use of the supporting shipper. Applicant's terminal at Wichita is located near the shipper's plant and its special equipment can be obtained on one hour's notice. In the circumstances, the examiner is of the opinion that a need has been shown for

the proposed operation and that a grant of such authority will not adversely affect present transportation facilities to any material extent.

Because of the affiliation and control of applicant with other motor carriers previously mentioned, the question of dual operations under section 210 of the Interstate Commerce Act arises. Applicant maintains records and personnel separate from the affiliated companies. The commodities are different and the equipment is not interchangeable. Dual operations were approved by the Commission in Nos. MC-11185 (Sub-No. 94), MC-11185 (Sub-No. 91), MC-11185 (Sub-No. 96) and MC-110077. Similar approval is warranted here as the existing situation would not be materially changed by the granting of the instant application.

The examiner finds that operation by applicant as a contract carrier by motor vehicle, in interstate or foreign commerce, over irregular routes, of aircraft assemblies, uncrated, requiring special handling and equipment because of the fragile nature thereof, from Indianapolis, Ind., to Wichita, Kans., will be consistent with the public interest and the national transportation policy; that applicant is fit, willing and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and the rules and regulations thereunder; and that a permit authorizing such operation should be granted.

The examiner further finds that the holding of a permit by applicant and the holding of a certificate No. MC-110077 by Jack Cooper, Jr., and Thom Cooper, a partnership, doing business as J-T Transport Company, and the holding of a permit in No. MC-30884 by Jack Cooper Transport Company, Inc., will be consistent with the public interest and the national transportation policy.

It is recommended that the appended order be entered.

By Leo W. Cunningham, Examiner.

(Signature) Leo W. Cunningham, Recommended by Leo W. Cunningham, Examiner. (Signature) Leo W. Cunningham.

[fol. 19] Order

At a Session of the Interstate Commerce Commission, Division 1, held at its office in Washington, D. C., on the — day of —— A. D. 1957.

No. MC-11185 (Sub-No. 102)

J-T Transport Company, Inc., Extension—Indianapolis, Ind.

Investigation of the matters and things involved in this proceeding having been made, said application upon due notice having been heard by the examiner, who has made and filed a report herein containing his findings of fact and conclusions thereon, which report is hereby made a part hereof, and said proceeding having been duly submitted:

*It is ordered*, That upon full compliance with all requirements of section 215 and 218 of the Interstate Commerce Act, with the rules and regulations thereunder, and with the requirements established generally and discussed at some length in *Contracts of Contract Carriers*, 1 M.C.C. 628, a permit be issued to applicant authorizing operation, in interstate or foreign commerce, as a contract carrier by motor vehicle of the commodities described, and in the manner described, in the findings in said report.

*It is further ordered*, That the application in all other respects be, and it is hereby, denied.

And it is further ordered, That this order shall be effective on

By the Commission, division 1.

[seal] Harold D. McCoy, Secretary.

[fol. 20] APPENDIX "B" TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

No. MC-11185 (Sub-No. 100)[1]

J-T-TRANSPORT COMPANY, INC., EXTENSION—COLUMBUS, OHIO

Decided January 31, 1958.

Operation by applicant as a contract carrier by motor vehicle, over regular routes, (1) in No. MC-11185 (Sub-No. 100), of uncrated airplane parts and equipment, (except airplane engines) which because of their fragile nature require special handling and special equipment, between Grand Prairie and Garland, Tex., on the one hand, and, on the other, Columbus, Ohio, and (2) in No. MC-11185 (Sub-No. 102), of aircraft assemblies from Indianapolis, Ind., to Wichita, Kans., found not shown to be consistent with the public interest and the national transportation policy. Applications denied.

*James F. Miller* for applicant in No. MC-11185 (Sub-No. 100).

*James W. Wrape* and *Louis I. Dailey* for applicant in No. MC-11185 (Sub-No. 102).

*Paul F. Sullivan* and *James K. Knudson* for a protestant in both proceedings.

*Douglas McHendrie* and *Ernest A. Brooks, II*, for protestants in No. MC-11185 (Sub-No. 102).

Report of the Commission

Division 1, Commissioners Hutchinson, Walrath, and McPherson by Division 1:

These applications were heard separately and were the subject of separate reports and recommended orders of examiners. Since, however, related issues are involved, they will be disposed of here in a single report.

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[1] This report also embraces No. MC-11185 (Sub-No. 102). J-T Transport Company, Inc., Extension—Indianapolis, Ind.

Exceptions to the order recommended by the examiner in the title proceeding were filed by protestant, and applicant replied. In the sub-title proceeding, exceptions to the order recommended by the examiner were filed by rail protestants and by a motor carrier protestant, and applicant replied. Our conclusions differ from those recommended in each proceeding.

In the title proceeding by application filed October 17, [fol. 21] 1956, J-T Transport Company, Inc., of Kansas City, Mo., seeks a permit authorizing operation, in interstate or foreign commerce, as a contract carrier by motor vehicle, over irregular routes, of uncrated airplane parts and equipment, (except airplane engines) which parts and equipment because of their delicate nature require special handling and special equipment, between Grand Prairie and Garland, Tex., on the one hand, and, on the other, Columbus, Ohio.

In No. MC-11185 (Sub-No. 102), by application filed March 14, 1957, the same applicant seeks a permit authorizing operation, in interstate or foreign commerce, as a contract carrier by motor vehicle, over irregular routes, of aircraft assemblies, uncrated, requiring special handling and special equipment because of their fragile nature, from Indianapolis, Ind., to Wichita, Kans.

U. S. A. C. Transport, Inc., hereafter called U.S.A.C., opposes both applications, and Ace Dran Hauling and Rigging Co., Daniel Hamm Drayage Company, Al Jeffries Trucking Co., Nieman Transfer and Storage Co., Taylor Heavy Hauling Co., Belger Cartage Service, Inc., and class I rail carriers in western trunkline territory oppose the Sub-No. 102 application.

The examiner in each proceeding recommended a grant in its entirety of the considered application. In the title proceeding, on exceptions, U.S.A.C., assigns error to the examiner's findings (1) that shipper requires a type of service which cannot be rendered by it, and (2) that the evidence warrants the granting of the authority sought. It asserts that the examiner erred in failing to find that shipper's support is based on preference rather than need for service. It also argues that the record does not establish a basis for the inclusion of the term "equipment" in the recommended commodity description, and that if any au-

thority is granted applicant, it should be restricted to a one-way movement. Applicant in reply contends (1) that the record is clear that shipper requires the specialized service proposed, (2) that applicant is the only carrier of record capable of performing this type of service, and (3) that a two-way service is needed. It urges approval of the examiner's findings.

[fol. 22] On exceptions in No. MC-11185 (Sub-No. 102), rail protestants object to the commodity description recommended by the examiner as being too broad, stating that it should be limited to "landing gear bulkheads". In its exceptions, U.S.A.C. asserts that the examiner's findings ignore the fact that it is a specialized common carrier of aircraft parts and is experienced in the handling of delicate or fragile shipments; that shipper's desire for a contract carrier with a terminal at Wichita is not in itself sufficient reason for granting the application; that it has equipment with which to perform a service similar to that proposed; that it is willing, if necessary, to modify its existing trailers to the extent required; and that existing common carrier service has not been shown to be inadequate in any material respect. It further contends that in this and other pending proceedings applicant, with the cooperation of the supporting shipper, plans to siphon off lucrative traffic, leaving it to haul the less desirable shipments; that in so doing, applicant's *modus operandi* is to construct a special trailer before seeking operating authority, whereupon it asserts that no existing carrier has the type of equipment required to perform the proposed service. Applicant in reply denies generally the contentions of exceptants and urges that the application be granted.

The evidence adduced in each proceeding, the examiners' recommendations, the exceptions, and the replies thereto have been considered. We find the statements of facts contained in the examiners' reports to be accurate in all material respects; and, as hereafter amplified or restated for clarity of discussion, we adopt such statements as our own.

Applicant is a contract carrier by motor vehicle of uncrated aircraft parts and equipment and conducts substantial operations between various points in the West and Midwest. It holds temporary authorities, conditioned to

expire upon final determination of these proceedings, to transport the commodities and from, to, and between the points applied for in the two applications. The application in the title proceeding is supported by North American Aviation, Inc., hereafter called North American, and the other application is supported by Boeing Airplane Company, hereafter called Boeing.

[fol. 23] North American manufactures principally military aircraft. It subcontracts for parts which are shipped to its Columbus plant for use in the assembly of finished aircraft. As pertinent here, certain items are purchased F.O.B. from subcontractors in Grand Prairie and Garland. These items are made of metal highly susceptible to damage and must be transported in closed equipment for reasons of protection and security. Shipper previously used air freight for transportation of these items. However, when the airline introduced a type of plane whose smaller doors would not permit the loading of certain of the items, shipper requested applicant to perform the service. Shipper is using applicant's service from points of origin other than those involved here; and such service, together with that rendered by applicant under temporary authority, is satisfactory. Production schedules for the assembly of finished aircraft are such that shipper must control and direct the movement of the considered commodities, and the traffic must be handled with meticulous care. Specially designed transportation equipment must be used. Applicant modified certain of its equipment to meet the specifications of the shipper.

Boeing assemblies aircraft at Wichita. Prior to its use of applicant, shipper used rail service for the transportation to its Wichita plant of landing gear bulkheads from Indianapolis. Rail service proved unsatisfactory, however, because of slow transit time and because of the necessity of using expensive crating to protect the lading from damage. Specially designed motor carrier equipment is required, and applicant modified certain of its equipment to meet the specifications of this shipper. Applicant's service under temporary authority is satisfactory.

Two of the three motor common carriers which submitted evidence in opposition to the application in MC-11185 (Sub-No. 102) are so-called heavy haulers, one with author-

ity to operate between points in Missouri and Kansas, and the other holding authority to operate between points in Indiana and Missouri. By an interline arrangement at Kansas City, these two claim to be able to handle aircraft landing gear bulkheads to Boeing's satisfaction.

U.S.A.C. is authorized, as here pertinent, to transport aircraft parts and equipment, crated or uncrated, (1) between Garland and Grand Prairie, on the one hand, and, on the other, Columbus, and (2) from Indianapolis to [fol. 24] Wichita. It specializes in the transportation of aircraft parts and equipment, operates 173 tractors and 225 trailers. It has a terminal at Dallas, Tex., approximately 15 miles from Grand Prairie and Garland, and one at Wichita. It is willing and able to modify as much of its equipment as is needed to meet shippers' specifications, but has never been requested by either supporting shipper to do so. Because of its specialization in the transportation of aircraft parts and equipment, it is able to adapt its operations to any production schedules which shippers may set up. Neither North American nor Boeing has attempted to avail itself of the services of U.S.A.C., or, so far as these records show, of any other common carriers.

Here we have a situation in which the supporting shippers have made no attempt to utilize the services of existing carriers, one of which specializes in the transportation of the commodities here involved. True, applicant specially modified certain trailers for use in the transportation of the aircraft parts here involved and has satisfactorily served the supporting shippers under its temporary authorities. But neither these facts nor the desire of the supporting shippers to continue utilizing applicant's service, standing alone, are sufficient to warrant a grant of the authority sought. The existing services of the opposing carriers which appear to be in a position to handle the described traffic and are willing to modify equipment if necessary, have not been tried, much less shown to be inadequate. In fact, no attempt whatsoever has been shown to have been made to ascertain if the existing service is capable of meeting the needs of the supporting shippers. The burden is upon an applicant seeking contract carrier authority, as well as one seeking common carrier authority, to establish, among other things, that there is a need for

the service proposed which existing carriers cannot or will not meet. Compare *Girton Bros., Inc., Extension—Louisville*, 69 M.C.C. 229, and *Warren Transport, Inc., Com. Car. Application*, 69 M.C.C. 241. A service not needed cannot be found consistent with the public interest or the national transportation policy.

In No. MC-11185 (Sub-Nos. 100 and 102), we find that applicant has failed to establish that the respective proposed operations are consistent with the public interest and the national transportation policy, and that each application should be denied. An appropriate order will be entered.

Commissioner Walrath, being necessarily absent, did not participate in the disposition of these proceedings.

[fol. 25] Order

At a Session of the Interstate Commerce Commission, Division 1, held at its office in Washington, D. C., on the 31st day of January, A.D. 1958.

No. MC-11185 (Sub-No. 100)

J-T Transport Company, Inc., Extension—Columbus, Ohio

No. MC-11185 (Sub-No. 102)

J-T Transport Company, Inc., Extension—Indianapolis, Ind.

Investigation of the matters and things involved in these proceedings having been made, and said division, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That said applications, be, and they are hereby, denied.

By the Commission, division 1.

[seal.] Harold D. McCoy, Secretary.

[fol. 26] APPENDIX "C" TO COMPLAINT

Order

At a General Session of the Intertate Commerce Commission, held at its office in Washington, D. C., this 25th day of July, A. D. 1958

No. MC-11185 (Sub-No. 100)

J-T TRANSPORT COMPANY, INC., EXTENSION—COLUMBUS, OHIO (Kansas City, Mo.)

No. MC-11185 (Sub-No. 102)

J-T TRANSPORT COMPANY, INC., EXTENSION—INDIANAPOLIS, IND.

Upon consideration of the record in the above-entitled proceedings, and of:

(1) Petition of Aircraft Industries Association of America, Inc., to intervene, filed April 14, 1958;

(2) Petition of Contract Conference of American Trucking Associations, Inc., to intervene in both proceedings, dated April 14, 1958;

(3) Reply to Petition for leave to intervene in (1) and (2) above by U.S.A.C. Transport, Inc., protestant, dated May 9, 1958;

(4) Petition of applicant in No. MC-11185 (Sub-No. 100) for reconsideration and oral argument, filed April 11, 1958;

(5) Petition of applicant in No. MC-11185 (Sub-No. 102) for reconsideration and oral argument, filed April 14, 1958;

(6) Petition of North American Aviation, Inc., intervener in support of the application in No. MC-11185 (Sub-No. 100) for reconsideration and oral argument, filed April 18, 1958;

(7) Petition of Contract Carrier Conference, of American Trucking Associations, Inc., in both proceedings for reconsideration, filed April 14, 1958;

(8) Petition of Aircraft Industries Association of America for reconsideration and oral argument in both proceedings, filed April 14, 1958;

(9) Reply, to the above petition for reconsideration

and/or argument, of U.S.A.C. Transport, Inc., protestant, dated May 12, 1958;

and good cause appearing therefor:

*It is ordered*, That Aircraft Industries Association of America, Inc., and the Contract Carrier Conference of American Trucking Associations, Inc., be, and they are hereby, permitted to intervene in said proceeding with the right to appear and participate in all further proceedings herein;

*It is further ordered*, That said petitions for reconsideration and/or oral argument in both proceedings be, and they are hereby, denied, for the reasons that (a) the findings of division 1 are in accordance with the evidence and the applicable law and (b) no sufficient cause appears for reopening these proceedings for oral argument.

By the Commission.

[SEAL.] Harold D. McCoy, Secretary.

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[fol. 27] APPENDIX "D" TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

Date of Service
June 25, 1959

No. MC-11185 (Sub-No. 100)[1]

J-T TRANSPORT COMPANY, INC., EXTENSION—COLUMBUS, OHIO

Decided June 15, 1959

Upon reconsideration, findings in prior report, 74 M.C.C. 324, decided January 31, 1958, affirmed. Operation by applicant as a contract carrier by motor vehicle, over irregular routes, (1) in No. MC-11185 (Sub-No. 100), of uncrated airplane parts and equipment (except airplane engines), which because of their fragile nature require special handling and special equipment, between Grand Prairie and

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[1] This report also embraces No. MC-11185 (Sub-No. 102), J-T Transport Company, Inc., Extension—Indianapolis, Ind.

Garland, Tex., on the one hand, and, on the other, Columbus, Ohio, and (2) in No. MC-11185 (Sub-No. 102), of aircraft assemblies uncrated, which because of their fragile nature require special handling and special equipment, from Indianapolis, Ind., to Wichita, Kans., found not shown to be consistent with the public interest and the national transportation policy. Applications denied.

Appearances as shown in the prior report, and, in addition:

*Harry R. Brashear, Clarence D. Todd, Dale C. Dillon, Vern W. Porter, Robert J. McBride, Albert B. Rosenbaum, Roland Rice, John C. Bradley,* and *James E. Wilson* for interveners in one or both applications.

Report of the Commission on Reconsideration

By the Commission:

In these proceedings J-T Transport Company, Inc., of Kansas City, Mo., seeks permits authorizing operations, in interstate or foreign commerce, as a contract carrier by motor vehicle, over irregular routes, (1) in No. MC-11185 (Sub-No. 100) of uncrated airplane parts and equipment (except airplane engines), which parts and equipment because of their delicate nature require special handling and special equipment, between Grand Prairie and Garland, Tex., on the one hand, and, on the other, Columbus, Ohio, and (2) in Sub-No. 102 of Aircraft assemblies,[2] uncrated, [fol. 28] requiring special handling and special equipment because of their fragile nature, from Indianapolis, Ind., to Wichita, Kans. U.S.A.C. Transport, Inc., hereinafter called U.S.A.C., opposes both applications and six so-called heavy haulers, and class I rail carriers in western trunkline territory also oppose the Sub-No. 102 application.

In the prior report, 74 M.C.C. 324, decided January 31, 1958, division 1 denied both applications. Petitions for reconsideration and a request for oral argument were filed by

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[2] Applicant in its petition for reconsideration and request for oral argument, dated April 12, 1958, indicated a willingness to restrict the commodity description to "landing gear bulkheads."

applicant in each proceeding; Aircraft Industries Association of America, Inc., and the Contract Carrier Conference of the American Trucking Associations, Inc., filed petitions for leave to intervene in support of applicant and for reconsideration or further hearing in both proceedings; and North American Aviation, Inc., intervener in support of applicant, filed a petition for reconsideration in the title proceeding. U.S.A.C. replied to each petition. By order of July 25, 1958, Aircraft Industries Association and the Contract Carrier Conference were permitted to intervene, and the petitions were denied in all other respects. Upon further consideration of the records and of second petitions in each proceeding by applicant for reconsideration, and of replies thereto by U.S.A.C., we reopened the proceedings for reconsideration on the present records. Subsequently, the Common Carrier Conference-Irregular Route and the Regular Common Carrier Conference of the American Trucking Associations, Inc., were permitted to intervene.

The material facts in each proceeding are not in dispute. Applicant, a motor contract carrier of uncrated aircraft components and assemblies, conducts operations between various points in the West and Midwest. It maintains [fol. 29] terminals at Wichita and Kansas City, Kans., and Grand Prairie, and operates 33 tractors and 45 trailers. Each of its trailers is suitable for transporting aircraft parts, and each is equipped with special fixtures designed to handle the particular parts transported. It regularly assigns certain vehicles to each of its various customers for its exclusive use, and at the time of the hearing was serving eight different aircraft manufacturers. Its drivers have security clearance.

North American Aviation, Inc., hereinafter called North American, supports the title application. It is a principal contractor with the Federal Government for certain types of military aircraft which it produces at its plant in Columbus. Certain component parts of these aircraft, such as fuselage sections, flaps, tips, and pylons, are purchased f.o.b. from sub-contractors located at Grand Prairie and Garland. These items are constructed principally of titanium, aluminum, and stainless steel and are highly susceptible to damage; therefore, they must be transported in specially-fitted, closed equipment for protection as well as for security rea-

sons. Because of their intended use as components of airplanes, it is essential that the parts arrive in perfect condition. Likewise, dependable service is of the essence as it is not practicable to stockpile these articles; and, unless the parts arrive undamaged and according to schedule, North American's assembly-line schedule is disrupted. This shipper formerly used air freight for the transportation of these items but occasionally there was damage to some of the parts which moved by air; and when the airline introduced a type of plane whose smaller doors would not permit [fol. 30] the loading of certain of the items it requested applicant to provide the service. Applicant modified two of its trailers to fit specifications submitted by this shipper; assigned this equipment to its exclusive use; and pursuant to appropriate temporary authority transported 18 shipments between Grand Prairie and Garland, on the one hand, and, on the other, Columbus during a 3-month period. Its service was entirely satisfactory and shipper desires its continuance. Although the shipper knew of U.S.A.C.'s service, it did not request this carrier to provide equipment or offer it the traffic.

Boeing Airplane Company, hereinafter called Boeing, supports the Sub-No. 102 application. A manufacturer at Indianapolis supplies Boeing with landing-gear bulkheads which it installs in planes at its Wichita assembly plant. The dimensions of the forward and aft bulkheads are 128 by 90 by 42 inches and 122 by 181 by 24 inches, and they weigh 1,380 and 1,340 pounds, respectively. The service needed as regards the movement of landing-gear bulkheads are similar to those of North America in that these articles, because of their nature, must be transported in specially-designed, closed equipment, with their delivery being made in accordance with Boeing's production schedule. While applicant must deadhead its equipment 700 miles from Wichita to Indianapolis to perform the proposed service, it has sufficient advance notice to schedule the movement. Prior to the use of its service under appropriate temporary authority, the shipper used rail service, but the necessity of constructing special containers made the cost of this service prohibitive. During a 4-month period applicant transported about four shipments a month in one of its trailers equipped with special fixtures for transporting this particular shipper's

[fol. 31] traffic and assigned to the exclusive use of shipper. This service has been highly satisfactory. Although the shipper knew that U.S.A.C. was authorized to perform the proposed service, it did not request that carrier to supply equipment for the reasons that U.S.A.C.'s tariff provides that it can exercise control over the type of equipment that will be used for any particular shipper, and, in 1953, it had unsatisfactory experiences in the use U.S.A.C.'s service.

U.S.A.C. holds certificates authorizing it, insofar as here pertinent, to transport, over irregular routes, aircraft parts and equipment, crated or uncrated, (1) between Garland and Grand Prairie, on the one hand, and, on the other, Columbus, and (2) between Indianapolis and Wichita. Approximately 60 percent of its traffic consists of aircraft parts other than engines and the remainder consists principally of aircraft engines. As a result of having served the aircraft industry almost exclusively over a period of years, it is accustomed to modifying its equipment to meet the specific requirements of particular aircraft manufacturers, and it is able to tailor its service to fit the production schedules established by its customers. It maintains, among others, terminals at Dallas, Tex., approximately 15 miles from Garland and Grand Prairie, and at Topeka, Kans., and Indianapolis. It operates 173 tractors and 225 trailers, some of which, if fitted to the shippers' specifications, would be suitable for transporting the considered traffic. Its drivers are required to have security clearance. If tendered the considered traffic, it would modify and make available to the shippers whatever equipment is necessary to meet their transportation requirements.

[fol. 32] Two so-called heavy haulers, both common carriers, submitted evidence in opposition to the Sub-No. 102 application. Belger Cartage Service, Inc., holds authority to operate between points in Missouri and Kansas, and Daniel Hamm Drayage Company is authorized to operate between points in Indiana and Missouri. By interlining at Kansas City, they purport to be able to handle aircraft landing gear bulkheads to Boeing's satisfaction. There is also interline rail service from Indianapolis to Wichita.

In the prior report division 1 found that the motor transportation desired by North American and Boeing could be

provided adequately by U.S.A.C.; that there was no need shown for the proposed service; and that the applicant had failed to establish that the proposed operations would be consistent with the public interest and the national transportation policy. On petition applicant contends (1) that the type of service required to meet the supporting shippers' reasonable transportation requirements in each proceeding can only be provided by a contract carrier; and that protestants, all common carriers, are not authorized to perform such service, (2) that the decision in the prior report is at variance with that of the District Court in *Bass* v. *United States*, 163 F. Supp. 1, because of a failure to consider whether adequate contract-carrier service was available, and (3) that the criteria as set forth in sections 203(a)(15) and 209(b), as amended, of the Interstate Commerce Act must be determinative of applications seeking contract-carrier authority, and that proper consideration has not been given to these sections of the statute, (4) that the legislative history preceding the 1957 amendments to the sections referred to in (3) above reveals that willingness and ability of common carriers to transport the traffic [fol. 33] should not bar a grant of contract-carrier authority, (5) that as a practical matter, U.S.A.C. does not have the specialized equipment required for the considered movements, could not adapt its equipment to handle this traffic, and is unable to provide the personalized service which the supporting shippers require, and (6) that a denial of the applications would give U.S.A.C. a monopoly with respect to the traffic.

U.S.A.C. replies (1) that, as a specialized carrier of aircraft parts, albeit a common carrier, it offers and can provide substantially the same type of service as that proposed by applicant; and that it is willing to modify its equipment to meet the shippers' specialized needs and to dedicate certain of its equipment to the shippers' exclusive use, (2) that sections 203(a)(15) and 209(b) do not contain the sole elements for consideration in the disposition of applications for contract-carrier authority, (3) that the 1957 amendments to the act affecting contract carriers do not relieve an applicant seeking contract-carrier authority of the burden of establishing a need for the proposed service, (4) that, inasmuch as the supporting shipper in each case

has failed to use its services, existing service has not been shown to be inadequate, and (5) that it should be afforded a reasonable opportunity to demonstrate its available service before an additional competitive service is authorized.

## Discussion and Conclusions

In view of the issues raised by the pleadings with respect to the interpretation to be placed upon the 1957 amendments of sections 203(a)(15) and 209(b) of the act, we deem it appropriate to discuss fully the matters of statutory construction presented herein in the light of the background of [fol. 34] our prior consideration and disposition of applications for contract carrier operating authority, of decisions in which the distinction between common and contract carriage has been explored, and of the events which led to the enactment of these amendments.

Prior to the 1957 amendments to the act, the definition of a contract carrier by motor vehicle, contained in section 203(a)(15) provided:

> The term "contract carrier by motor vehicle" means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation.

The definition of a common carrier by motor vehicle, which was not affected by the 1957 changes in the act, contained in section 203(a)(14) reads:

> The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation. . .

Over a period of some 20 years literally hundreds of new service or extensions-of-service contract carrier applications requiring the application of the above-stated definition in relation to other sections of the act have been considered and disposed of by this Commission. In these proceedings

certain distinctions between motor contract carrier and motor common carrier operations have evolved, and for a clear understanding of the matters under consideration here some discussion of this historical development preceding the 1957 amendments is appropriate at this point.

[fol. 35] The only limitation imposed by definition upon transportation which may be provided by a motor common carrier is that it must be held out to the public generally. In other words, a motor common carrier is required through its tariffs to make a continuing offer to the general public of any service which it proposes and which it is authorized to perform. Other than this requirement and those limitations contained in its certificate with respect to commodities, territories, or otherwise, no restriction is imposed upon the manner in which a common carrier may perform its physical operations, provided, in all instances, that the same service is made available to all who may desire to use it. It may perform, and in numerous instances the terms of its certificate limit its operations to the performance of, a so-called special service. On occasions the very terms of a common carrier's certificate make it necessary for it to provide special vehicular equipment such as a tank vehicle or a low-boy unit, and the inherent nature of the service authorized confines its activities to a certain industry. Within the terms of its certificate, however, it is under a duty to serve all members of the public desiring its service.

Thousands of certificates authorizing special types of operations have been issued; and U.S.A.C.'s operation is a classic example of a common carrier "specializing" in service for a particular industry. Its services are legitimately within the scope of a common carrier's function if such services are held out to all who can use them. Fundamentally, each service performed by a common carrier must, of necessity, be "specialized" to a certain degree to meet the particular needs attending the movement of any commodity. What could be more specialized than the services furnished [fol. 36] by the so-called oil-field carriers to the oil and gas industries? The nature and variety of the services of these common carriers, both in respect to the commodities handled and the special equipment and other facilities furnished, is detailed in *Mercer Extension—Oil Field Commodities*, 74

M.C.C. 459; and many similar situations could be cited. The conclusion, therefore, is inescapable that a motor common carrier may, in accordance with the statutory definition, physically provide all transportation services within the scope of its authority, consistent with its duty and obligations as a common carrier, and with any degree of specialization necessarily inherent to the traffic transported.

On the other hand, specialization has always been a factor considered by us when it is necessary to determine whether an operation is common or contract carriage, as, for example, in *Craig Contract Carrier Application,* 31 M.C.C. 705, 712, where it was stated:

> We recognize, of course, that even specialization in physical operation does not negative a common-carriage status where, for example, such physically specialized services are affirmatively held out to all shippers in that particular class of the public having a need therefor. But, on the other hand, we are convinced that the lack of one or the other forms of specialization above indicated conclusively negatives contract carriage as contemplated by section 203(a)(15) of the act.

In commenting on this report, the Supreme Court in *United States* v. *Contract Steel Carriers,* 350 U. S. 409, 411, said: "A requirement of specialization is supported by respectable legislative history."

[fol. 37] As seen, prior to these amendments, even where a highly specialized service was proposed, the existence of common carrier service, if any, and whether or not that service would meet the reasonable transportation needs of those supporting the application, was always considered in our determination of applications for contract carrier authority. The ability of common carriers to compete with contract carriers for the same traffic has been recognized from the inception of motor carrier regulation in 1935, and in each contract carrier application opposed by a common carrier the burden was upon the applicant to establish that existing common carriers could not satisfactorily meet the reasonable transportation requirements of the shipper or shippers supporting the application. Early, in *C. & D. Oil*

*Co. Contract Carrier application*, 1 M.C.C. 329, 332 an application for contract carrier authority, it was said:

> We think that, in order to foster sound economic conditions in the motor-carrier industry, existing motor carriers should normally be accorded the right to transport all traffic which they can handle adequately, efficiently, and economically in the territory served by them, as against any person now seeking to enter the field of motor-carrier transportation in circumstances such as are here disclosed.

For many years this principle has been followed in disposing of applications for contract carrier permits opposed by common carriers, the decisive factor being whether the available common carrier service was reasonably adequate to meet the transportation needs involved.[3]

[fol. 38] The import of applicant's position here is that under the 1957 legislation this long-established principle has been abandoned, and that this legislation was intended not only to delineate the distinction between common and contract carriage, but was also intended so to separate these two types of motor transportation as to virtually eliminate the ability of a common carrier to compete with a contract carrier for the same traffic, and thus to render the fact that motor common carrier service available is of little or no weight in the disposition of contract carrier applications. In our view such a position is untenable.

As of August 22, 1957, the definition of a contract carrier by motor vehicle in section 203(a)(15) of the act was amended to read as follows:

> The term 'contract carrier by motor vehicle' means any person which engages in the transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than

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[3] *Arrow Transp. Contract Carrier Application*, 73 M.C.C. 261; *Refiners Transport, Inc., Extension—Missouri*, 71 M.C.C. 272; *Overland Freight Lines, Inc., Extension—Kentucky*, 69 M.C.C. 143; *Guer Extension—Chicago Commercial Zone*, 67 M.C.C. 224; *Kilmer Transp. Co. Extension—Uniontown*, 53 M.C.C. 561; and *Hibbard Extension of Operations—Lime*, 47 M.C.C. 311.

> transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct needs of each individual customer.

At the same time section 209(b) was also amended. As pertinent, it provides that:

> . . . In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this act, the Commission shall consider the number of shippers to be served by applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon applicant and/or its shipper and the changing character of the shipper's requirements. . .

[fol. 39] Both amendments were enacted as a result of certain proposals made by us to Congress in our 70th annual report, wherein we noted at page 163 that amendments were needed to *preserve* the distinction between contract and common carriers and to insure that all contractural arrangements of contract carriers would cover only individual and specialized service. As we have indicated, these proposals were prompted by the fact that under the prior law, as construed by the Courts, contract carriers were free to add contracts within the scope of their permits. Before the decision in the *Contract Steel Carriers case*, there were instances in which some contract carriers expanded their activities to such an extent that they were serving numerous shippers and were otherwise conducting their operations in a manner which raised serious doubts as to whether they were operating lawfully as contract carriers. Proceedings were instituted against certain of these carriers, and among the factors considered in determining whether they were operating as *bona fide* contract carriers was the number of transportation contracts into which they had entered.

*Transportation Activities of Fischbach Trucking Co.*, 61 M.C.C. 185; *Transportation Activities of Midwest Transfer Co.*, 49 M.C.C. 383, 51 M.C.C. 355, 52 M.C.C. 33, and 52 M.C.C. 261. The *Contract Steel Carriers case*, in effect, served to preclude consideration by us of the number of shippers served as one of the criteria for determining such proceeding, and opened the door to contract carriers to negotiate an unlimited number of transportation contracts. Thus too often the distinction between contract and common [fol. 40] carrier service vanished, since contract carriers, due to their ability to negotiate numerous additional contracts, were in effect offering their services to the public generally. It was to preserve or reinstate the distinction between common and contract carriage, both in respect to specialization and the number of shippers to be served, that the 1957 amendments were enacted.

As originally proposed, section 203(a)(15) would have defined a contract carrier as one which, among other things, furnishes transportation service "not provided by common carriers" and section 209(b) would have required that this Commission, before granting contract carrier authority, make the findings, among other things, that "existing common carriers are unwilling or unable to provide the type of service for which a need has been shown." While Congress was still considering this proposal, we concurred in the deletion of the above-quoted language for the reason that it was not considered necessary to carry out the purpose of the amendments. This deletion should not be construed as an expression of an intention on the part of Congress to eliminate the standing of common carriers to oppose contract carrier applications, but rather its purpose was to insure that too heavy a burden of proof was not imposed upon contract carrier applicants. Thus, in explaining to the Senate [fol. 41] Subcommittee on Surface Transportation the proposed modifications in the bill to revise the definition of the term "contract carrier by motor vehicle," we noted:

> These words are not necessary to carry out the purpose of the bill and the deletion thereof is consistent with our previously expressed position, and with the standard already provided in the bill respecting special and individualized service.[4]

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[4] S. Rep. No. 703, 85th Cong., 1st. Sess. 5(1957).

And former Chairman Clarke, who, in testifying before the same Senate subcommittee, stated:

> I wish to state at this point, that because of the very difficult burden or proof that would be imposed on applicants by the last mentioned provision, (that is, that additional permits may be issued only upon a showing that existing common carriers are unable or unwilling to render the required type of service) the Commission, upon further consideration, has voted to withdraw its recommendation to amend section 209(b) in this respect.[5] (Matter in parenthesis added).

We think it clear that the purpose of Congress in enacting the 1957 amendments was to sharpen the distinction between common and contract carriage by imposing upon contract carriers specific restrictions as to the number of shippers which they may serve and the type of service which they may perform; that Congress did not intend or even contemplate the abandonment of our long-continued practice of considering the adequacy of existing common as well as contract carrier service in determining whether a need has been established for a proposed contract carrier operation; [fol. 42] and that there is no indication in the language of these amendments or in the legislative history surrounding their enactment that Congress intended to place any limitation upon the type of service which a common carrier may lawfully perform. Plainly there was no intention to enhance the economic position of the contract carrier at the expense of the common carrier. We conclude therefore, that a common carrier may perform, as it could prior to these amendments, a variety of specialized services, so long as it operates within the scope of its certificates and holds itself out to perform these same services for all members of the particular segment of the shipping public which has a need for them and which it is authorized to serve. And certainly there is nothing in the legislative history or elsewhere to support the proposition that, under the amendments, an applicant, once it establishes that its proposed operation falls within the definition of contract carriage, is

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[5] Hearing before the Subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce 85th Congress., 1st Sess., at 22(1957).

entitled automatically to a grant of authority consistent with the desires of the supporting shippers, regardless of the availability of common carrier service, or even contract carrier service. Such a construction would negative the history of the new legislation and run contrary to the provisions of the national transportation policy which must be considered in the disposition of all applications for operating authority.

Section 209(b) as it now reads sets out certain criteria which we must consider in determining whether a grant of authority will be consistent with the public interest and the national transportation policy. Most of these points may be best discussed in relation to the peculiar facts of the instant applications, but it should be noted here that one [fol. 43] of the factors to be considered is the effect which a grant of authority would have upon the services of protesting carriers. The statute does not say that the effect upon protesting contract carriers only is to be considered, and there is no reason to assume that Congress intended us to ignore the available service offered by motor common carriers or rail carriers or the effect which a grant of authority would have upon them. The question presented, then, is how we are to determine whether a grant of authority will adversely affect the service of a protestant. It might be argued that where, as here, a protestant is not now enjoying the involved traffic, it cannot be adversely affected by a grant of authority. However, we believe that our past holdings that existing carriers are entitled to transport all the traffic which they can economically and efficiently handle before additional authority is granted are equally valid today as they were prior to the 1957 amendments to the act. There is, in effect, a presumption that the services of existing carriers will be adversely affected by a loss of *potential* traffic, even if they may not have handled it before. Any doubt that we might have that existing carriers generally should be afforded an opportunity to handle available traffic before a new service is authorized is disspelled by the specific wording of section 209(b), and a number of applications for contract carrier authority have, in fact, been denied since the passage of the 1957 amendment in

spite of the fact that the only opposition was that of common carriers.[6]

It should also be pointed out here that there is no indication that Congress intended the criteria contained in section [fol. 44] 209(b) to be exclusive or to preclude our consideration of other factors in determining contract carrier applications. It has consistently been held that all sections of the act must be interpreted and administered in accordance with the national transportation policy which provides, as pertinent:

> It is hereby declared *to* be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; . . .

In *Schaffer Transportation Company* v. *United States*, 355 U. S. 83, 88, the Supreme Court said: "[T]his Court has made it clear that this policy is the yardstick by which the correctness of the Commission's actions will be measured." The Congressional mandate could not be carried out if we were to close our eyes to any matter which might affect the good of the national transportation system as a whole. Surely sound economic conditions in the transportation industry could not be maintained if common carriers, who have the obligation of providing service to the public at large within the scope of their authorities, were faced with a situation in which available traffic could be, as it were,

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[6] *Wagner Contract Carrier Application*, 77 M.C.C. 777; *Coastal Motor Lines Contract Carrier Application*, 77 M.C.C. 510; *Woodward Extension—Woodblocks*, 76 M.C.C. 377; and *Carolina Haulers, Inc., Contract Carrier Application*, 76 M.C.C. 254.

withdrawn from general circulation and given to contract carriers, without these common carriers being given the opportunity to make an effective showing of their willingness and ability to provide needed service.

[fol. 45] Determination of the Instant Applications

We think that the application of the foregoing principles to the instant applications justifies some repetition of matters previously discussed generally. In deciding any application for contract carrier authority we must consider whether the operation proposed and the over-all operations of the applicant are those of a contract carrier. As noted, under the amended definition of a contract carrier (section 203(a)(15)), a person, in order to be a contract carrier

1. must be a carrier for hire, but not a common carrier; and

2. must serve, under continuing contracts, one or a limited number of persons, and either

(a) assign vehicles for a continuing period of time to the exclusive use of each person served, or
(b) furnish services designed to meet the distinct need of each individual customer.

Applicant presently has contracts with nine aircraft manufacturers, and all its pending applications, including the two under consideration here, are supported by shippers with which it already has contracts. Applicant does not hold out its service to the public generally, but offers to serve only these nine shippers. We conclude therefore, that it is a for-hire carrier, but not a common carrier as defined in the act, and serves a limited number of persons under continuing contracts. In addition, its usual practice is to assign vehicles to the exclusive use of individual customers for continuing periods of time, and it would follow this practice with respect to the service proposed here should the instant applications be granted. In view of the unusual design and fragile nature of the subject articles, [fol. 46] the security considerations, and the necessity for coordinating the delivery of the considered items with the shippers' production schedules, it is obvious that applicant

proposes to render a specialized service. Taking all these matters into considertaion, we think it clear that the operations proposed come within the new definition of contract carriage.

Also, as previously noted in determining whether a grant of contract carrier authority will be consistent with the public interest and the national transportation policy, we are required by section 209(b) to give consideration to the following factors: (1) The number of shippers to be served by applicant, (2) the nature of the service proposed, (3) the effect of a grant of authority upon the services of protesting carriers, (4) the effect of a denial on applicant and its supporting shipper, and (5) the changing character of the shipper's requirements.

The first factor, number of shippers to be served, is, as we understand it, to be considered on the basis of applicant's present and proposed situation in relation to the question whether applicant intends to serve "one or a limited number of shippers," and is thus a *bona fide* contract carrier as defined in section 203(a)(15) of the act. As seen by the foregoing, applicant meets this particular requirement.

The next factor, the nature of the proposed service, is one which must be considered particularly carefully in any case such as this where a contract carrier application is opposed by a common carrier. We must determine whether the service proposed and shown to be needed by the supporting shipper is one which might be performed by either a common or contract carrier, or by one such class of carriers only. It should be noted here that the requirements of many shippers could quite satisfactorily be met by either [fol. 47] a common or a contract carrier. If the carrier serves a limited number of shippers under continuing contracts and assigns vehicles to the exclusive use of each, it meets the statutory definition of a contract carrier, even though the equipment supplied or the service which it renders may be indistinguishable from that offered by common carriers. We have already determined that the service applicant proposes meets this definition.

The requirement of section 209(b) that we consider the effect which a grant of authority would have upon the services of protesting carriers has, we believe, been adequately discussed. It is sufficient at this point to say that, in view

of our finding herein that U.S.A.C. is in a position to provide any service that is needed, we conclude that a grant of authority to applicant would have an adverse effect upon that protestant. It may be worthy of repeating, however, that in the economic regulation of motor transportation through grants of operating authority, the principle that existing carriers should be accorded the opportunity to transport available traffic that they can handle adequately, efficiently, and economically in the territories they serve before a competitive service is authorized is sound doctrine, in the public interest, and in the furtherance of the national transportation policy, whether the application is one for common or contract carrier authority.

Section 209(b) next requires us to consider the effect of a denial on applicant and its supporting shipper. With respect to the effect of a denial on applicant, we note that although applicant has incurred substantial expense in fitting certain of its trailers to the shippers' specifications, this equipment is of the type which is suitable generally for [fol.48] transporting aircraft parts and may, with modifications, be used to handle other traffic. In any event, both applicant and its supporting shippers knew or should have known that U.S.A.C. held the requisite authority to provide the proposed services, and therefore their agreement and the expenditures made by applicant prior to the filing of the application cannot be allowed to be controlling, of themselves, in resolving the issues presented here. Any other construction of such preapplication action by either a shipper or a prospective applicant would open the door to numerous abuses and thwart the basic purpose of our regulation and the national transportation policy.

Whether the shippers would be adversely affected by a denial must depend upon a determination of whether existing service is adequate to meet their transportation requirements. U.S.A.C., by confining its activities almost entirely to serving the aircraft industry, is presently furnishing a highly specialized service to numerous other aircraft manufacturers whose requirements are similar, if not the same, as those of the supporting shippers. In fact, its ability to obtain business depends on its ability to satisfy the needs of shippers having transportation requirements similar to those of these supporting shippers, and it is dependent upon

the very kind of traffic as is here considered for the continuance of its operations. In view of our determination that a common carrier may furnish a specialized service provided it offers such service to the public generally, there is no question but that U.S.A.C. holds the operating authority necessary to furnish the needed service. Its drivers have security clearance; it has equipment suitable for transport-
[fol. 49] ing aircraft assemblies, parts, and equipment; and, if the supporting shippers will furnish it with specifications for the fixtures necessary to handle their particular traffic, it will modify as many pieces of its equipment as is necessary to provide adequate service. Furthermore, it is willing to dedicate certain of its trailers to the exclusive use of each of the shippers. In this connection, it is noted that its tariff contains a provision whereby it may exercise control over the type of equipment to be used in a particular movement. This is a provision frequently found in tariffs published by common carriers; however, in view of this protestant's expressed willingness to modify its equipment to fit the shippers' specifications and to assign such equipment to the excluive use of each of the shippers, there does not appear to be anything in its tariff which would prevent it from rendering a satisfactory service.

Considering the highly specialized service in transporting traffic similar to that here considered which U.S.A.C. is presently rendering to numerous manufacturers and suppliers in the aircraft industry, its ability and willingness to provide the service which the supporting shippers require, and the fact that, with respect to the instant traffic, neither shipper has attempted to avail itself of U.S.A.C.'s services, we cannot find that existing service has been shown to be inadequate. Plainly, there is no warrant on these records for a finding that the supporting shippers require a distinct type of service that cannot be provided by U.S.A.C. To the contrary the very business of U.S.A.C. is the transportation of the type of traffic involved.

[fol. 50] The final matter which section 209(b) directs us to consider in determining contract carrier applications is the effect which a denial would have upon the changing character of the shipper's requirements. What this criterion refers to, we believe, are situations in which a shipper presently being provided with a complete trans-

portation service by a contract carrier experiences a change in such things as the marketing areas which it serves, the commodities which it handles, or the location of its plants, which require that its carrier acquire additional operating authority if it is to continue to render a complete service. There is no indication that such a situation exists here with respect to either of the two supporting shippers.

At this point we wish to make clear, as hereinbefore indicated, that the matters discussed are not the only ones which should or can be considered in the determination of contract carrier applications. While they embrace the important considerations of the need for the proposed service and the adequacy of existing service, they are not all inclusive, and other factors affecting the public interest and the national transportation policy may, and in some cases must, be considered. Where, for example, the issuance of a permit would result in objectionable dual operations by applicant as a common and contract carrier, this fact must be considered. Likewise, the relationship of the supporting shipper to the applicant may be an opponent's important objection to the proposed operation and would have to be dealt with from the standpoint of the public interest and our duty under the national transportation policy.

[fol. 51] Although applicant argues that denial will give U.S.A.C., a monopoly with respect to the traffic, it appears that there is only sufficient traffic to support one carrier's operation and that U.S.A.C. should be given an opportunity to transport it before a new carrier is permitted to enter the field. In the circumstances, we consider its argument as to monopoly to be without merit.

In our opinion nothing herein is inconsistent with the results obtained in the *Bass* decision or in *Schaffer Transportation Company* v. *United States*, supra cited by applicant in its pleadings. Rather than support for applicant's position the *Bass* decision is in accord with the findings made here. There the Court affirmed this Commission's denial of an application for contract carrier authority to perform a charter passenger service in which our action was based solely on the ground that existing common carriers could meet the needs of the public for charter service. Although the Court stated, *inter alia*, that there

is a duty to determine "whether the existing contract service is adequate" in a proceeding in which an applicant seeks authority to perform a "contract service," the Court apparently was referring to the peculiar characteristics of a charter bus service where a group collectively contracts for the exclusive use of certain equipment. In our opinion, the Court did not imply, as applicant suggests, that where contract carrier authority is sought this Commission must grant a permit where there is no contract carrier available to perform the service regardless of the existence of adequate common carrier service. We are of the further opinion that even though the decision of Division 1 in the *Bass* application was reached prior to the [fol. 52] 1957 amendments to the act, the conclusion reached by the Court that available common carrier service must be given consideration in an application for contract carrier authority continues to be valid.

In the *Schaffer case* the Supreme Court held that, when deciding an application for motor carrier operating authority, we must consider, among other things, the inherent advantages of the several modes of transportation. Contract and common carriage by motor vehicle are not separate modes of transportation but rather are subdivisions of the same mode, that is, motor transportation. Consequently where, as here, it appears that a motor common carrier is able to furnish a service substantially similar to that proposed by a motor contract carrier applicant, the *Schaffer* decision does not negate our long-continued policy of giving consideration to the effect on existing common carriers before approval is given to a grant of additional motor carrier authority, whether it be contract or common; nor do we believe it requires any different result from that reached here.

Therefore, we conclude in each proceeding, (1) that the character of shippers' transportation requirements is not such as to preclude their performance by a common carrier, (2) that U.S.A.C. is fully able to meet the shippers' needs and would be adversely affected by a grant of either application, (3) that in view of the adequacy of existing common carrier service the supporting shippers would not be materially affected by a denial of the applications, (4) that the potential loss of traffic to U.S.A.C. outweighs any

detriment to applicant, (5) that to authorize the proposed operations will not be consistent with the public interest [fol. 53] and the national transportation policy, and (6) that under the circumstances, both applications should be denied.

Findings

On reconsideration, in Nos. MC-11185 (Sub-No. 100) and MC-11185 (Sub-No. 102), we find that applicant has failed to establish that the proposed operations will be consistent with the public interest and the national transportation policy; and that each application should be denied.

An appropriate order will be entered.

Commissioner Freas concurs in the result.

Commissioner Walrath, concurring:

While I concur in the result reached by the majority, I would have preferred for the report to cover more fully the matter of services that a contract carrier must, under the amendments, now provide.

Commissioner Webb, concurring:

Weighing the five tests prescribed by Section 209(b) of the Act for determining whether a permit should be issued, I agree with the result reached by the majority. It seems to me, however, that the report prescribes a sixth test not authorized by the Congress and, in fact, a test considered by the Congress and deliberately rejected. The report seems to me to convey the impression that if an applicant for contract carrier authority flunks this sixth test, the application must be denied regardless of the extent to which the five enumerated tests of Section 209(b) have been satisfied.

[fol. 54] What I call the sixth test prescribed by the report is the conclusion that in each contract carrier application the burden is on the applicant to show that protesting common carriers are unwilling or unable to meet the shipper's reasonable transportation requirements. The conclusion, in my opinion, is not supported by the language of Public Law 85-163 or by the pertinent legislative history.

When the bill (S.1384) which became Public Law 85-163 was introduced, it amended Section 203(a)(15) of the Act

so as to define a contract carrier as one who conducts its business other than as a common carrier and—

> "* * * under continuing contracts with one person or a limited number of persons for the furnishing of transportation services of a special and individual nature required by the customer *and not provided by common carriers.*"

The Senate Committee on Interstate and Foreign Commerce deleted the language italicized above. In addition, the Committee eliminated from the bill the requirement of a showing under Section 209(b) "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown." In place of the language last quoted, the Committee directed the Commission to consider "the effect which granting the permit would have upon the services of the protesting carriers." As thus amended, the bill was enacted into law.

Obviously, there is virtually no difference between the test formulated in the report of the Commission and the test which would have been prescribed by the language deleted from the bill. I do not see how it is possible to contend that the stricken language added nothing to the bill. Nor do I agree that the Senate Committee deleted [fol. 55] that language solely because it required an impossible burden of proof. If the Congress had intended to sanction the test employed in the report, it would no doubt have required in Section 203(a)(15) that the proposed service must be shown to be "not provided by *protestant* common carriers" and in Section 209(b) "that *protestant* common carriers are unwilling or unable to provide the type of service for which a need has been shown."

Contract carriers opposed the bill as originally introduced on the ground that to require proof as to the nonexistence of adequate common carrier service would prevent extension of, if not destroy, contract carrier service. The Department of Commerce agreed. The Congress agreed. The need to employ a public convenience and necessity standard in Section 209 proceedings disappeared when under the new law, permits ceased to be unrestricted licenses for hunting traffic. As I see it, the report attempts to write into Sections 203(a)(15) and 209(b) language

deliberately stricken by the Congress. The report converts compromise legislation, generally satisfactory to all concerned, into an unearned legislative victory for common carriers and a humiliating legislative defeat for contract carriers.

Commissioner McPherson dissenting:

On reconsideration I now conclude that the applications should be granted.

Shippers require a service in which vehicles are assigned to them for their exclusive use for continuing periods of time. The protestants hold authority which is broad enough. However, the question is not restricted merely to the holding of appropriate authority, but also embraces [folo. 56] the service which the shippers require. The specialized service required by these shippers is within the definition of contract carriage.

In weighing the effect a grant of denial would have upon the services of the protestant, and the applicant, and/or the shipper, I would decide in favor of a grant in these particular cases.

Commissioners Mitchell, Arpaia and Winchell did not participate.

[fol. 57] Order

At a General Session of the Interstate Commerce Commission held at its office in Washington, D. C., on the 15th day of June—A.D. 1959.

No. MC-11185 (Sub-No. 100)

J-T Transport Company, Inc., Extension—Columbus, Ohio

No. MC-11185 (Sub-No. 102)

J-T Transport Company, Inc., Extension— Indianapolis, Ind.

*It appearing*, That on January 31, 1958, the Commission, division 1, entered its consolidated report, 74 M.C.C. 324, and order in the above-entitled proceedings denying the said applications;

*It further appearing*, That upon consideration of the

record, and of the second petition of the applicant for reconsideration, and of the reply thereto by U.S.A.C. Transport, Inc., and for good cause shown, by orders entered November 5, and October 16, 1958, respectively, the proceedings were reopened for reconsideration on the present record;

*And it further appearing*, That reconsideration of the matters and things involved in these proceedings has been given, and that the Commission, on the date hereof, has made and filed its report on reconsideration herein containing its findings of fact and conclusions thereon, which report and the said report of January 31, 1958, are hereby referred to and made a part hereof:

*It is ordered*, That the said applications be, and they are hereby, denied.

By the Commission.

Harold D. McCoy, Secretary.

[Seal.]

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[fols. 58-79] Appendix "E" to Complaint

Order

At a General Session of the Interstate Commerce Commission held at its office in Washington, D. C., on the 16th day of October, A.D. 1958.

J-T Transport Company, Inc., Extension— Indianapolis, Ind.

Upon consideration of the record in the above-entitled proceeding, and of the second petition of the applicant for reconsideration, tendered for filing on September 2, 1958, and of a reply by U.S.A.C. Transport, Inc.; and good cause appearing therefor:

*It is ordered*, That the said second petition for reconsideration be, and it is hereby, accepted for filing.

*It is further ordered*, That the order heretofore entered herein on July 25, 1958, insofar as it denied petitions for reconsideration, be, and it is hereby, vacated and set aside.

*And it is further ordered*, That the said proceeding be,

and it is hereby, reopened for reconsideration on the present record, for the issuance of a further report and order of the Commission.

By the Commission.

[SEAL.] Harold D. McCoy, Secretary.

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[fol. 80] IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

DEFENDANT'S ANSWER—FILED OCT. 20, 1959

The United States of America and the Interstate Commerce Commission (the latter hereinafter called the Commission), defendants in this action, answer the complaint of the plaintiff as follows:

1

Admit the allegations contained in Part I of the complaint.

2

Admit the allegations contained in Part II of the complaint, except that the defendants deny those portions of the second (unnumbered) subparagraph which allege that since the 5th day of August, 1957, the plaintiff has held temporary authority from the Commission in Docket No. MC-11185 (Sub-No. 103TA), and that upon the filing of the complaint of the plaintiff it may continue to perform [fol. 81] transportation which had been authorized in its Sub 103TA docket pending final adjuication of the issues presented in the complaint, and on the contrary the defendants allege that, pursuant to Section 9(b) of the Administrative Procedure Act (5 U.S.C. 1008(b) ), the Commission's Special Rules of Procedure for Temporary Operating Authorities (49 C.F.R. 2.2(f)(1)(i) ), and the Commission's General Rules of Practice (49 C.F.R. 1.101 (e) ), the plaintiff's temporary authorization in its Docket No. MC-11185 (Sub-No. 103TA) ceased to be in force and effect on and after July 25, 1959, and any transportation of the commodities in question from and to the points in question performed by the plaintiff after the date last mentioned has been performed without any legal warrant whatsoever.

Admit the allegations contained in Part III of the complaint, except that (1) with respect to the subsection of the Interstate Commerce Act cited in the first (unnumbered sub-paragraph, the defendants aver that the correct citation is "Section 210a(a) of the Interstate Commerce Act, 49 U.S.C. 310a(a)," and the defendants deny those portions of such first (unnumbered) sub-paragraph which allege that the plaintiff has been continuing to perform the involved transportation under color of a temporary authorization by the Commission, and they deny the allegation that upon the filing of the plaintiff's complaint it may continue to perform such transportation, and on the contrary the defendant's allege that such temporary authorization ceased to be in force and effect on and after July 25, 1959, for the reasons specified in Paragraph 2 of this answer; (2) with respect to the date of filing of the recom-[fol. 82] mended report and order of the examiner, recited in the third (unnumbered) subparagraph, the defendants aver that such report was filed on July 16, 1957; (3) with respect to the report and order of Division 1 of the Commission, handed down on January 31, 1958, as recited in the ninth (unnumbered) subparagraph, the defendants deny that in rendering such report and order, Division 1 acted as an Appellate Division of the Commission within the meaning of that term as used in Section 17 of the Interstate Commerce Act, 49 U.S.C. 17, and the court is informed that the report of January 31, 1958, was officially published in 74 M.C.C. 324; (4) the defendants deny the implication contained in the seventeenth (unnumbered) paragraph that the reason for the issuance of the order of the Commission of October 16, 1958, (Appendix "E" to the complaint) was the issuance by Division 1 of the Commission of a report in another proceeding which appeared, upon the face thereof, to be diametrically opposed, in material respects, to the report of the Commission of January 31, 1958, (Appendix "B" to the complaint); and (5) with respect to the report and order of the Commission of June 15, 1959, (Appendix "D" to the complaint), recited in the twentieth (unnumbered) subparagraph, the Court is informed that such report was officially published in 79 M.C.C. 695; these defendants deny that the application in

plaintiff's Docket No. MC-11185 (Sub-No. 102) was denied in the report of June 15, 1959, upon the same grounds contained in the report of Division 1, of January 31, 1958; and they deny the characterization that the report of June 15, 1959, constitutes nothing more nor less than an extended argument in support of an effort to bolster the report and order of January 31, 1958, and they respectfully refer the court to the report of June 15, 1959, for [fol. 83] the proper interpretation thereof.

4

Deny the allegations contained in Parts IV and V of the complaint.

5

For further answer to the complaint, the defendants allege that all of the parties to the proceeding before the Commission were given a full and complete hearing; that the findings and conclusions in the reports and orders attacked in the complaint were and are fully supported and justified by the evidence submitted in said proceeding; that in making such reports and orders the Commission carefully considered and applied the criteria fixed by law, considered and weighed carefully the National Transportation Policy, considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance and condition required by law to be considered, and weighed as well each fact, circumstance and condition called to its attention by the parties to said proceeding by their respective counsel or otherwise; that said reports and orders were not made or entered unreasonably, arbitrarily, capriciously, or in abuse of its discretion; that in making said reports and orders, the Commission did not exceed the authority conferred upon it by law; and, except as expressly admitted in this answer, the defendants deny each and every allegation contained in the complaint.

Wherefore, having fully answered, the United States of America and the Interstate Commerce Commission, defendants, pray that the relief sought in the complaint be dismissed, and that judgment be entered for the de- [fol. 84] fendants, with costs against the plaintiff.

John H. D. Wigger, Attorney, Department of Justice, Washington 25, D. C.

Robert A. Bicks, Acting Assistant Attorney General. Edward L. Scheufler, United States Attorney, Western District of Missouri, Kansas City, Missouri, Attorneys for the United States of America.

James Y. Piper, Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C., Attorneys for the Interstate Commerce Commission.

Robert W. Ginnane, General Counsel.

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[fol. 84-a] INTERSTATE COMMERCE COMMISSION

Washington 25, D. C.

CERTIFICATE OF SECRETARY OF INTERSTATE COMMERCE COMMISSION

I, HAROLD D. McCOY, Secretary of the Interstate Commerce Commission, do hereby certify that the attached are true copies of the following:

Application filed March 14, 1957 on Form B.M.C. 78,

Transcript of the stenographer's note of hearing held May 22, 1957 at Denver, Colorado, and exhibits 1 to 26, both inclusive, filed at said hearings,

Exceptions of Class I Rail Carriers, filed August 12, 1957,

Exceptions of U.S.A.C. Transport, Inc., filed August 14, 1957,

Reply of Applicant, filed September 17, 1957,

Petition of Applicant for Reconsideration, filed April 15, 1958,

Second Petition of Applicant for Reconsideration, filed September 2, 1958, and

Petition to Intervene of Common Carrier Conference-Irregular Route, filed November 5, 1958,

in Docket No. MC-11185 (Sub-No. 102), J-T Transport Company Extension—Columbus, Ohio, and

Petition to Intervene of Contract Carrier Conference, filed April 15, 1958,

Petition for Reconsideration of Contract Carrier Conference, filed April 15, 1958,

Reply of U.S.A.C. Transport, Inc., filed May 13, 1958,
Petition to Intervene of Regular Common Carrier Conference, filed November 7, 1958,

Reply of Regular Common Carrier Conference, filed November 7, 1958, and

Reply of Applicant, filed November 17, 1958,

in Docket No. MC-11185 (Sub-No. 1003), J-T Transport Company, Inc., Extension—Columbus, Ohio, and Docket No. MC-11185 (Sub-No. 102), J-T Transport Company, Inc., [fol. 84b] Extension—Columbus, Ohio, the originals of which are now on file and of record in the office of said Commission.

In Witness Whereof I have hereunto set my hand and affixed the Seal of said Commission this 10th day of February, A. D. 1960.

HAROLD D. McCOY, Secretary of the Interstate Commerce Commission.

[fol. 85] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. MC-11185 (Sub-No. 102)

In the Matter of the Application of J-T TRANSPORT COMPANY, INC., 3501 Manchester Trafficway, Kansas City, Missouri, Contract Carrier, Irregular Route

**Stenographer's Minutes**

Room 37, New Custom House, Denver, Colorado
Wednesday, May 22, 1957.

Met pursuant to notice, at 9:30 a.m.

Before: Leo W. Cunningham, Examiner.

APPEARANCES:

James W. Wrape, Attorney at Law, Sterick Building, Memphis, Tennessee, appearing for the applicant.

Douglas McHendrie, Attorney at Law, 730 Equitable Building, Denver 2, Colorado, appearing for Class I Rail Carriers, in Western Trunk Line Territory, Protestants.

Paul F. Sullivan, Attorney at Law, 1821 Jefferson Place, N. W. Washington, D. C., appearing for U.S.A.C. Transport, Inc., Protestant.

Ernest A. Brooks, II, Attorney at Law, 1301 Ambassador Building, St. Louis, Missouri, appearing for Ace Doran Hauling & Rigging Co., Daniel Hamm Drayage Co., A. L. Jeffries Trucking Co., Niman Transfer & Storage Co., Taylor Heavy Hauling Co., and Belger Cartage Service, Inc., protestants.

[fol. 86] PROCEEDINGS

Exam. Cunningham: The hearing will come to order. The rules of the Interstate Commerce Commission prohibit smoking in the hearing room at any time.

The Interstate Commerce Commission has set for hearing at this time and place before Examiner Leo Cunningham docket No. MC-1185, Sub-No. 102. filed March 14, 1957, in the matter of the application of J-T Transport Company, Inc., 3501 Manchester Trafficway, Kansas City, Missouri, for authority to operate as a contract carrier, over irregular routes, transporting: aircraft assemblies, uncrated, requir-

ing special handling and equipment, because of fragile nature, from Indianapolis, Indiana, to Wichita, Kansas.

Who appears for the applicant?

Mr. Wrape: Mr. Examiner, my name is James W. Wrape, Sterick Building, Memphis, Tennessee. I am an attorney and admitted to practice before the Interstate Commerce Commission. I appear for the applicant.

Exam. Cunningham: Who represents the protestants?

Mr. Brooks: My name is Ernest A. Brooks. I am an attorney and licensed to practice before the Interstate Commerce Commission. I represent Daniel Hamm Drayage Company of St. Louis, Missouri, and other carriers listed on the appearance blank.

Mr. Sullivan: Paul F. Sullivan, 1821 Jefferson Place, [fol. 87] Washington, D. C., appearing for U.S.A.C. Transport, Inc., protestant.

Mr. McHendrie: Douglas McHendrie, 730 Equitable Building, Denver, Colorado; I am an attorney and registered practitioner with the Commission. I am appearing for Class I Rail Carriers, in Western Trunk Line Territory, protestants.

Exam. Cunningham: Have all parties notified the applicant and the Commission ten days prior to the hearing that they intended to appear and their position?

Mr. Wrape: They have, sir.

Exam. Cunningham. Do you have any statement you wish to make?

Mr. Wrape: No, sir, call Mr. Cooper.

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Tom R. Cooper, was sworn and testified as follows:

Direct examination.

By Mr. Wrape:

Q. Give your full name, sir.
A. My name is Tom R. Cooper.
Q. Where do you live, Mr. Cooper?
A. I live at 6542 Wenonga Road, Kansas City, Missouri.
Q. With whom are you connected?
A. I am connected with the J-T Transport Company, Inc.
Q. That is the applicant here?

A. Yes, sir.

Q. What position do you hold with that company?

[fol. 88] A. I am the president.

Q. And in what business is it engaged?

A. It is engaged in the business of transporting airplane components?

Q. And is that its sole business?

A. Yes, sir.

Q. And its principal office is where?

A. Its principal office is 3501 Manchester Road, Kansas City, Missouri.

Q. How long has it been engaged in that business?

A. It has been engaged in this business since 1941.

Q. And have you been connected with it all of that time?

A. Yes, sir.

Q. Who are the other officers of that company?

A. The other officers are Jack Cooper, Jr., vice-president, Mr. H. W. Pearson, secretary.

Q. And who are the directors?

A. The directors are Jack Cooper, H. W. Pearson, Jane Cooper, Virginia Cooper, and Tom Cooper.

Q. Who are Jane and Virginia Cooper?

A. Jane and Virginia Cooper, Virginia is Jack Cooper's wife, and Jane Cooper is Tom Cooper's wife.

Q. Who owns the stock in that company?

A. Jack Cooper, Virginia Cooper, Jane Cooper, and Tom Cooper.

Q. In equal amounts?

[fol. 89] A. It is owned forty-nine shares by Jack Cooper, forty-nine shares by Tom Cooper, one share by Jane Cooper, and one share by Virginia Cooper.

Q. Now, are you connected with any other motor carrier?

A. Yes, sir.

Q. And what are the names of such carriers?

A. Jack and Tom Cooper doing business as J-T Transport Company. That is a partnership.

Q. Where is the location of that business?

A. It is at Kansas City, Missouri.

Q. And is it a common or contract carrier?

A. It is a common carrier.

Q. And what business does it do?

A. It is in the business of transporting new automobiles from Detroit to Kansas City, Missouri and Wichita, Kans.

Q. And is it engaged exclusively in the transportation of automobiles?

A. Yes, sir.

Q. And do you and your brother Jack Cooper own that company in equal amounts?

A. Yes, sir.

Q. Now, are you connected with any other motor carrier?

A. Yes, sir, Jack Cooper Transport Company, Inc.

Q. And where is its principal office?

A. Its principal office is 3936 Ewing, Kansas City, Missouri.

[fol. 90] Q. And is that a common or a contract carrier?

A. That is a contract carrier.

Q. It is a contract carrier?

A. Yes.

Q. Of automobiles?

A. Yes.

Q. And is it engaged exclusively in the transportation of automobiles?

A. Yes, sir.

Q. Does it have a single customer?

A. Yes, sir.

Q. And who is that?

A. Chevrolet Division of General Motors.

Q. Now, I think I forgot to ask you how long has the partnership been engaged in transporting automobiles as a common carrier?

A. The partnership has been engaged in the transporting of automobiles since 1939.

Q. And Jack Cooper Transport Company, Inc., has been engaged in the transportation of automobiles for how long?

A. Since 1929.

Q. Now, who are the other officers of Jack Cooper Transport Company, Inc.?

A. Jack Cooper, Jr. is the president, Tom Cooper is the vice-president, H. W. Pearson is the secretary, Mr. E. D. Weeks is a vice-president and a director; Mrs. E. D. Weeks is a vice-president and a director.

[fol. 91] Q. And who are Mr. and Mrs. Weeks?

A. Mrs. Weeks is my sister; Mr. Weeks is her husband.

Q. And who owns Jack Cooper Transport Company, Inc., the stock in it?

A. The stock in Jack Cooper Transport Company, Inc. is owned in equal shares by Jack Cooper, Jr., Mrs. E. D. Weeks, and Tom Cooper.

Q. Now, does the J-T Transport Company, the partnership, or Jack Cooper Transport Company, Inc., serve any customer that is served by the applicant here?

A. No, sir.

Q. Now, has the question of the dual control of the three companies by you and your brother been before the Commission before?

A. Yes, sir, several times.

Q. In each instance where you have had an extension, isn't that correct, sir?

A. Yes, sir.

Q. And has the Commission approved that dual control?

A. Yes, sir, they have.

Q. Now, for whom would you perform the service that is here proposed?

A. This service would be for Boeing Airplane Company.

Q. And the applicant is a contract carrier?

[fol. 92] A. Yes, sir.

Q. Does the applicant at the present time have contracts on file with the Commission covering transportation for Boeing?

A. Yes, sir.

Q. And is it true, sir, that if the permit sought here is granted it would simply be an additional operation for a company for whom you presently have contracts?

A. Yes, sir.

Q. Has there been any change in the management or the ownership of stock or control in the three companies since approval was first granted for the dual control?

A. No, sir, there has not.

Q. Now, what do you propose in this application?

A. In this application we propose to transport airplane parts uncrated requiring special equipment and handling because of the fragile nature of the commodities.

Q. Between what points?

A. Between Indianapolis, Indiana and Wichita, Kansas.

Mr. Sullivan: That isn't what the application says.

Mr. Wrape: What does the application say?

Mr. Sullivan: The application states "aircraft assemblies." He said "between"; the application says "from" and "to".

The Witness: I am sorry.

Mr. Wrape: Let's get him straight, Mr. Sullivan; he gets out of hand every once in a while.

[fol. 93] By Mr. Wrape:

Q. Is it a "from" operation?

A. Yes.

Q. From where?

A. From Indianapolis, Indiana, to Wichita, Kansas.

Q. And is it an aircraft part that is a component or an assembly of an airplane that you propose to transport?

A. Yes, sir.

Q. Now, are you familiar with that part that you propose to transport?

A. Yes, sir.

Q. And are you transporting it at the present time?

A. Yes, sir.

Q. And that is by reason of temporary authority?

A. Yes, sir.

Q. Now, I believe, Mr. Cooper, that you have prepared an exhibit which reflects the present operating authority of your company?

A. Yes, sir.

Mr. Wrape: May this multiple page document be marked for identification as exhibit 1?

Exam. Cunningham: It will be identified as exhibit 1.

(Document was marked applicant's exhibit No. 1, Witness Cooper, for identification.)

Q. You have before you, Mr. Cooper, what has been marked for identification as exhibit 1. What is it?

[fol. 94] A. Exhibit 1 are the different permits and temporary authorities that J-T Transport Company, Inc. is operating under.

Q. Does that include a copy of the order of temporary authority?

A. Yes, sir, it does.

Q. And when was the order of temporary authority granted?

A. It was granted April 9th 1957.

Q. Was there an emergency order prior to that?

A. Yes, sir.

Q. Now, I believe you told us that you and your brother also do business as a partnership under the name and style of J-T Transport Company as a common carrier. Have you caused to be prepared copies of the certificate issued to the partnership?

A. Yes, sir.

Mr. Wrape: May this one page document be marked for identification as exhibit 2?

Exam. Cunningham: It will be identified as exhibit 2.

(Document was marked applicant's exhibit No. 2, Witness Cooper, for identification.)

Q. You have before you, Mr. Cooper, what has been marked for identification as exhibit 2. Tell us what that is.

A. Exhibit 2 is the certificate of public convenience and necessity of Jack Cooper, Jr. and Tom Cooper, a partnership doing business as J-T Transport Company.

Q. Now, did you likewise prepare a copy of the permit issued to Jack Cooper Transport Company, Inc.?

[fol. 95] A. Yes, sir.

Mr. Wrape: May this one page document be marked as exhibit 3?

Exam. Cunningham: It will be identified as exhibit 3.

(Document was marked applicant's exhibit No. 3, Witness Cooper, for identification.)

Q. I will hand you what has been marked for identification as exhibit 3. Tell us what that is.

A. Exhibit 3 is the permit, Interstate Commerce Commission permit of Jack Cooper Transport Company, Inc.

Q. Now, is the partnership and the Jack Cooper Transport Company, Inc. conducting the operations that are shown on exhibits 2 and 3?

A. Yes, sir.

Q. Now, have you caused to be prepared here an exhibit which describes the equipment operated by your company?

A. Yes, sir.

Mr. Wrape: May this one page document be marked for identification as exhibit 4?

Exam. Cunningham: It will be identified as exhibit 4.

(Document was marked applicant's exhibit No. 4, Witness Cooper, for identification.)

Q. You have before you what has been marked for identification as exhibit 4. Tell us what it is.

A. Exhibit 4 is the equipment list of J-T Transport Company, Inc.

[fol. 96] Q. What do you show on this exhibit?

A. On this exhibit at the top it shows the various tractors owned and operated by J-T Transport. The next group is the group of special trailers that are owned and operated by J-T Transport. These particular trailers are all metal construction, with semi-underslung floors. They have special doors to open full width. They have tracks built into the trailers for loading and unloading the components.

They have special jigs, fixtures, that are built into each trailer for each particular type of load.

The next group of trailers are all metal construction; they are frameless; they are underslung. The inside floor of the trailer has a twelve-inch clearance from the road. The roof consists of either two or three doors that are hinged on one side and open completely up for loading and unloading with overhead cranes.

Each of these different groups of trailers has different jigs and fixtures built to haul specific items.

Q. Now, with respect to the tractors, let's take the first line. Does that mean you have one 1948 two and a half ton Dodge with the cab-over-engine?

A. Yes, sir.

Q. Let's get to the trailers. The number 304, the first trailer; what is that number?

[fol. 97] A. That is just the unit number.

Q. Is that your company accounting number?

A. That's right.

Q. Now, the next column is what?

A. That is the company that built the trailer.

Q. And the next column?

A. The next column shows where these particular trailers are in operation from. For example, Grand Prairie, Texas to Witchita, Kansas, and the next column shows who the operation is being conducted for.

Q. To read across would that mean that your trailer unit 364 was manufactured by Spencer and operates from Grand Prairie, between Grand Prairie and Witchita for Boeing?

A. Yes, sir.

Q. Have you prepared a balance sheet statement as of April 30 for submission here?

A. Yes, sir.

Mr. Wrape: May this one page document be marked for identification as exhibit 5?

Exam. Cunningham: It will be identified as exhibit 5.

(Document was marked applicant's exhibit No. 5, Witness Cooper, for identification.)

Q. You have exhibit 5 before you. Tell us what it is.

A. Exhibit 5 is the balance sheet of J-T Transport Company, Inc. as of April 30th 1957.

[fol. 98] Q. Are you familiar with that statement?

A. Yes, sir.

Q. Does it correctly reflect the condition of your company as disclosed by your books on that date?

A. Yes, sir, it does.

Q. Have you prepared for submission here a statement of income and expense?

A. Yes, sir.

Mr. Wrape: May this one page document be marked for identification as exhibit 6?

Exam. Cunningham: It will be identified as exhibit 6.

(Document was marked applicant's exhibit No. 6, Witness Cooper, for identification.)

Q. You have before you exhibit 6. Tell us what it is.

A. Exhibit 6 is an income statement of J-T Transport Company, Inc., from January 1st to April 30th 1957.

Q. Are you familiar with that statement?

A. Yes sir.

Q. Does it correctly reflect your operations as disclosed by your books for that period?

A. Yes, sir, it does.

Q. Tell us where you have terminals.

A. We have terminals at Kansas City, Missouri, Wichita, Kansas, and Grand Prairie, Texas.

[fol. 99] Q. And what was the purpose of the Kansas City terminal?

A. Well, the Kansas City terminal has headquarters where our books are kept, where our office operation is conducted.

Q. And what about the Witchita terminal?

A. The Wichita terminal is where our trailers, our jigs and fixtures are built, where the biggest part of our operation is conducted from.

Q. And would you describe that terminal for us?

A. Well, it is a concrete block building; it is a normal garage other than having extra-high doors, because some of our equipment is over height. It has a complete shop for repairing trucks and trailers. It also has a metal working shop where the majority of our jigs and fixtures are built.

Q. And the personnel that are located there?

A. The personnel are our Wichita manager, our mechanics, office girl, and drivers.

Q. Now, Mr. Cooper, under the temporary authority from what plant do you transport the commodity that is here involved?

A. The commodity being transported is transported from the H. & B. American Machine Company at Indianapolis.

Q. Now, is there any particular problem involved in the loading at their plant?

A. Well, on this particulr operation we had quite a problem. The part to be transported is a little over eleven feet high. It is about ten and a half feet long, about two feet wide. The problem was that the part had to be transported [fol. 100] with the eleven-foot dimension directly up and down.

Q. You mean upright?

A. Upright; to keep the equipment legal through the states it was operating we had to have a frameless underslung trailer. Then we found that at H. & B. they did not have overhead crane facilities available for loading these

parts, so we had to design an elevator built in the trailer, which is an electric elevator with gears, and operates with cables which raise a false floor or an elevator floor from the underslung part of the trailer up even to the rear wheels, so that a part can be rolled in or out.

Then to take care of the fact that they didn't have an overhead crane, and using our metal roofs we had to have the roof fastened directly to the elevator floor so that as the elevator raised up and the part on it raised up the roof would also raise up, so that the part would not touch.

Q. In other words, from the floor to the roof there is more than eleven feet in clearance?

A. That's right.

Q. All right; go ahead.

A. Then to load these parts at H. & B. it was necessary to design a fork truck with tracks built on the fork truck which the component could be affixed to. The fork truck would be driven to the back of the trailer, lifted to the trailer level into the trailer, rolled with the elevator into [fol. 101] place, and fastened down.

Q. And you say that you have transported the involved commodities in the trailer of that design?

A. Yes, sir, we have.

Q. Now, who designed the trailer?

A. The trailer was designed by J-T Transport.

Q. Now, do you handle these parts crated or uncrated?

A. These parts are handled uncrated.

Q. And do you transport them in a shipping fixture?

A. It is transported in a special shipping fixture.

Q. Who designed the shipping fixture?

A. The shipping fixture was designed by J-T Transport with Boeing Airplane Company's engineer's approval after the fixture was designed.

Q. And have you found the use of the fixture that you designed and the trailer that you utilize to be a feasible way of transporting the involved commodity?

A. Yes, sir, it was; it has worked very well.

Q. Have you had any damages.

A. No, sir.

Q. Now, what is the commodity made of?

A. The commodity is made of aluminum, magnesium and titanium.

A. And is it fragile and delicate?

A. Yes, sir, it is.

Q. Is it susceptible to damage?

[fol. 102] A. It is very easily susceptible to damage.

Q. Is it susceptible to strain and stress?

A. Yes, sir, it is.

Q. Now, do you have a picture of the trailer?

A. Yes, sir.

Mr. Wrape: May this picture be marked for identification as exhibit 7?

Exam. Cunningham: It will be identified as exhibit 7.

(Photograph was marked applicant's exhibit 7, Witness Cooper, for identification.)

Q. Now, you have before you what has been marked for identification as exhibit 7. Would you tell us, explain it to us, what it is.

A. Well, this is a rear-view picture of the trailer that is used in the operation from Indianapolis to Wichita. It is setting at the Boeing dock. This track, of course, is a portable track. It shows the track going into the trailer. It shows in the floor of the trailer the elevator floor at the raised position.

At the top of the picture it shows the roof of the trailer raised to the full position, and to the front, extreme front of the trailer, you can see the electric motor mechanism that raises and lowers the elevator.

Q. Now, when that false floor is lowered into the underslung portion, what happens to the roof?

[fol. 103] A. As the floor lowers the roof lowers. It is fastened permanently to the false floor so that it goes up and down as the floor goes up and down.

Q. Now, there appears to be a wide member extended from side to side of the trailer that seems to be below the roof. What is that?

A. That is the cross-member which is on hinges and opens for loading and unloading. In this particular picture they didn't have the member open.

Q. In other words, that would swing out on hinges?

A. That would swing out on hinges.

Q. And then the distance from the false floor to the roof is how much?

A. The distance is about eleven and a half feet.

Q. Now, do you have a picture of commodity loaded into the trailer?

A. Yes, sir; loaded into the trailer?

Q. Yes, sir.

A. Yes.

Q. And is the commodity in this picture in the shipping jig?

A. Yes, sir, it is.

Mr. Wrape: May this picture be marked for identification as exhibit 8?

Exam. Cunningham: It will be identified as exhibit 8.

[fol. 104] (Photograph was marked applicant's exhibit No. 8, Witness Cooper, for identification.)

Q. Now, I will hand you what has been marked for identification as exhibit 8. Tell us what that is.

A. Exhibit 8 is a rear view of the trailer at the Boeing dock. It shows the doors open. It shows the upper cross-member open. It shows the parts on the trailer with the elevator in a raised position and the roof in a raised position. It also shows the fixtures.

Q. Now, I notice some tracks or something directly in the middle of the fixture. What are they for?

A. The tracks?

Q. Yes.

A. The tracks are what the fixture rolls in and out of the trailer on to keep them exactly in line so they won't touch the sides or be damaged.

Q. And does the fixture move in the trailer over the highway on the tracks?

A. Yes, sir, it does.

Q. Now, was there any problem with respect to the casters?

A. The casters, because of the fire hazard it was necessary to use a special textile wheel that does not spark; there is no fire danger from it.

Q. And the caster is made of what?

A. It is made of a textile.

[fol. 105] Q. Cloth, you mean?

A. Yes, sir, and because of the weight of the parts and the fixture it again took a special caster that would stand

the weight and the transportation to keep the caster from tearing down under operation.

Q. Now, in exhibit 8 can you see the tie-downs, any of them?

A. Yes, sir, the tie-downs, there are two cables at the rear of each fixture. These tie-downs are unfastened now ready for the parts to be rolled out. At the front of the fixture, which we can't see, are more tie-downs to hold it from moving forward or backward.

Q. Now, in exhibit 7 can you see the motor that works the elevator?

A. Yes, sir, you can.

Q. Is that up in the front part of the trailer, the nose of the trailer?

A. Yes, sir, the motor, the reduction gear and so on to work the cables.

Q. Now, do you have a picture of the fixture lowered into the underslung portion of the trailer and with the roof down?

A. Yes, sir.

Mr. Wrape: May this picture be marked for identification as exhibit 9?

Exam. Cunningham: It will be identified as exhibit 9.

[fol. 106] (Photograph was marked applicant's exhibit No. 9, Witness Cooper, for identification.)

Q. Tell us about exhibit 9.

A. Exhibit 9 shows the fixture in the trailer. One fixture is loaded with bulkheads. The other fixture is temporary. It shows the fixtures lowered completely into shipping position. It shows the roof in place. The top cross-member has not been put in place. The tracts, the portable tracts, have not been put in the trailer yet.

Q. Now, do you have a picture of the assembly in the shipping fixture?

A. Yes, sir.

Mr. Wrape: May this picture be marked for identification as exhibit 10?

Exam. Cunningham: It will be identified as exhibit 10.

(Photograph was marked applicant's exhibit No. 10, Witness Cooper, for identification.)

Q. I will hand you what has been marked for identification as exhibit 10. Tell us what it is.

A. Exhibit 10 shows two of the shipping fixtures in Boeing Airplane Company's plant. It shows several people standing beside it, which will give you an idea of the height of it.

Q. Are those people midgets?

A. No, sir.

Q. Normal-sized people?

[fol.107] A. Yes, sir.

Q. Is one of them Mr. Solomon?

A. I believe that's Mr. Solomon with his back to us.

Q. I think he has more hair than that, Mr. Cooper. What are the shipping fixtures manufactured of?

A. The shipping fixtures are manufactured of steel.

Q. Now, do you know how many loads you have transported so far?

A. I believe we have transported fourteen loads.

Q. And have you had any claim for damages?

A. No, sir, we have not.

Q. And what is your ordinary time in transit?

A. Our transit time runs about thirty hours.

Q. Now, this piece of equipment that you have identified here, is that used for the transportation of any other assembly for any other shipper?

A. No, sir, it is not, and it could not. It is designed specifically to haul these particular parts, and the way the part fastens it would be good for nothing other than transporting these particular parts.

Q. And how many of such units do you have at the present time?

A. Of the shipping fixtures?

Q. No, of the trailers?

A. At this time we are operating one truck.

Q. Would you identify this particular unit on exhibit 4?

[fol. 108] A. This trailer is trailer number 338.

Q. It's a Spencer unit that is operated from Indianapolis to Wichita for Boeing?

A. That's right.

Q. Now, do you perform this operation on a schedule, or how?

A. We perform this operation at exactly the time Boeing

Airplane Company tells us to. Our equipment is available standing waiting at Wichita for Boeing to instruct us as to when to pick the parts up.

Q. And at Indianapolis do you perform the loading, or does the manufacturer there?

A. The manufacturer performs the loading with our driving, watching and giving instructions in case of any new people on exactly how it is to be put in and how it is to be fastened down.

Q. And what about the unloading?

A. The unloading is done by Boeing Airplane Company.

Q. And you say this piece of equipment is exclusively dedicated to Boeing and is operated at their call and demand?

A. Yes, sir.

Mr. Sullivan: That's a trifle leading, Mr. Wrape.

Mr. Wrape: I will summarize it, Mr. Sullivan; I agree with you it was a little leading.

Q. Now, does your company have a contract with Boeing covering the temporary operation?

[fol. 109] A. Yes, sir, we do.

Q. And in the event the permanent permit is granted will you enter into a contract with accordance with the Commission's rules and regulations?

A. Yes, sir.

Q. Will you tell the examiner whether or not in your opinion you can continue to perform this operation in compliance with the Commission's rules and regulations?

A. Yes, sir, we can.

Q. And will you give him your opinion as to whether or not you can continue to transport the involved commodity expeditiously and without damage?

A. Yes, sir, we can.

Mr. Wrape: I will offer the exhibits and tender the witness.

Exam. Cunningham: Any objections to exhibits 1 through 10?

Mr. Brooks: I have none.

Mr. Sullivan: No.

Exam. Cunningham: Exhibits 1 through 10 will be received then.

(Applicant's exhibits Nos. 1 through 10, Witness Cooper, for identification, were received in evidence.)

Cross-examination.

By Mr. Brooks:

Q. Mr. Cooper, what is the weight of the assembly for which you gave the dimensions eleven feet high, ten and a [fol. 110] half feet long, two feet wide?

A. The weight on one piece is 1200 and some pounds, and the other is 1300 and some pounds. You have a total load of less than—as I remember, it is 5500 pounds.

Q. I see; whose fork lift truck is used at the plant of the H. & B. American Machine Company at Indianapolis which you said is utilized to load these articles?

A. Well, I am giving an opinion. I think it is H. & B.'s; it is not ours.

Q. That's what I wanted to get at, whether or not it is your equipment.

A. No, sir, it is not.

Q. Now, has the same driver of the J-T Transport Company handled all fourteen of the loads which have been handled from Indianapolis to Wichita?

A. I believe it has been two different drivers.

Q. You do not have one driver only assigned to this particular movement?

A. Yes, sir, we do, but I believe that he was sick for about a week or ten days.

Q. I see. Now, sir, your company operates low-bed equipment in addition to the equipment used here as shown in exhibits 7 through 10, do you not?

A. We have a lot of underslung equipment, but all of our equipment is completely enclosed. We don't have any what you would call open low-boy trailers at all.

[fol. 111] Q. I see. Sir, would the articles sought to be transported here be capable of moving over the highways because of the height on a low-bed trailer?

A. Not and be in legal height. A low-bed trailer, a low-boy trailer, a floor is about two feet to three feet high, and to transport this part legally you have got to have an inside floor of about twelve inches.

Q. Twelve what?

A. Twelve inches high from the road.

Q. Twelve inches high from the road?

A. Yes, sir.

Q. So that the eleven feet plus the roof would not be too high to get under the bridges?

A. That's right.

Q. Do you use any over-height permits on this particular movement?

A. No, we do not; this unit is thirty-five feet long and twelve foot-six high.

Q. Have you checked the highway or checked to determine whether or not it would be feasible to obtain over-height permits and thereby haul it on higher equipment without this elevator?

A. Well, no, sir, we have found that anytime that we can get and transport a part in legal equipment, that the various highway departments will not give us over-height permits.

[fol. 112] Q. Had you sought any over-height permits when you first got this temporary authority?

A. No, sir, we didn't need them.

Q. Did you already have this piece of equipment built at the time you got the temporary authority?

A. Yes, sir.

Q. Now, how long have you had the temporary authority, sir? Is that April 9th 1957?

A. That would be when the temporary authority started, yes, sir. There was an emergency authority, I believe, before that.

Q. Oh, I see; so how long have you had either temporary or emergency authority thus far?

A. Well, I believe it is a little over three and a half to four months.

Q. I see, sir. Is it profitable economically to transport fourteen shipments in one vehicle from Indianapolis to Wichita over a period of four months dedicating an entire piece of equipment to that movement alone?

A. Mr. Brooks, we have been in the habit of making a profit in our operations in every operation we have, and it is this general type of operation.

Q. I appreciate that, but I am asking you here if fourteen movements in four months dedicating one entire unit to the movement—

A. We think so.

[fol. 113] Q. —is in your opinion an economic, economically good for your company?

A. We think so.

Q. And I understand that the equipment otherwise waits around at Witchita subject to the call of Boeing?

A. Yes, sir, it does.

Q. Is there any guaranteed amount of tonnage in your contract from Boeing?

A. Yes, sir there is a guarantee over a period of a year.

Q. Is there anything about this equipment that you know of that would prevent it from being transported in an open trailer; that is, without sides or top?

A. Yes, sir, the parts are very easily damaged; they are more or less susceptible to water and dirt. There are bearings that are involved. We have found over a period of years that we have been transporting these parts that it is definitely a much safer operation to transport them in completely enclosed trailers.

Q. Well now, sir, the bearings you speak of, and looking at exhibit 10, are all encased in a waterproof paper or cloth as shown, is that not correct?

A. Well, I don't know that it is waterproof. The bottom bearings are covered, the bearings that you can see at about the middle of the part are in the open.

Q. Who built and paid for these racks which you see in [fol. 114] exhibits 8, 9, and 10 that are holding the component assemblies?

A. J-T Transport built, designed and paid for the racks that are used in the trailers.

Q. I see. How many racks have you built?

A. We have four racks for the trailer. On top of that I believe we have built another four racks that Boeing is using and that Boeing paid for. In other words, when the parts come to Boeing one rack is rolled out of the trailer and an empty rack is rolled in to facilitate the speed of the loading.

Q. Only two can be transported in a trailer at one time?

A. No, sir, it is four. The picture doesn't show too good. As the elevator goes down this fixture can roll ahead in the underslung part of the trailer, and completely off of the elevator rolls in on a track and is fastened down, and there

would be two fixtures side by side and two in front side by side.

Q. Is the equipment as shown in exhibit 9 the same type of specially made equipment underslung and approximately a foot high as used by Daniel Hamm Drayage Company for Boeing?

A. I know that it is definitely not the same. That particular unit, I believe, runs from St. Louis to Tulsa, and that trailer is ten feet wide, and I believe it has a canvas roof, and it is over thirty-five feet long.

Q. It is approximately eight or nine inches off the ground, is it not, at the bottom?

[fol. 115] A. I believe it is.

Q. In your opinion would the equipment such as shown in exhibit 10 and exhibit 9 fit in the type of trailer Daniel Hamm Drayage Company operates over the road, if you know?

A. It would not be allowed to run over the road because the trailer is ten feet wide, and unless you are carrying a part that is about that wide you are not going to get over-dimension permits.

Q. How wide is this piece of equipment in exhibit 9?

A. Eight feet.

Q. Do you have any leased equipment?

A. No, sir.

Q. This particular truck in exhibit 9 is owned by J-T?

A. Yes, sir, it is; all of our equipment is owned by J-T.

Mr. Brooks: I believe that's all.

Q. (By Mr. Sullivan) Mr. Cooper, do you presently serve Wichita in your automobile hauling operation?

A. J-T Transport Company hauls automobiles from Detroit to Kansas City and Wichita, yes.

Q. And is your Wichita terminal a combination terminal used both by your automobile hauling equipment as well as your aircraft hauling equipment?

A. No, sir, it doesn't.

Q. You don't station any of your automobile hauling equipment at Wichita?

[fol. 116] A. No, sir, it is all stationed at Kansas City.

Q. Have you ever transported any motor vehicles to the Boeing plant at Wichita?

A. No, sir, I don't believe we have. I know J-T Transport Company hasn't. It could be possible that Jack Cooper Transport Company have transported some Chevrolet trucks for the air force, but I don't think they have.

Q. Does this traffic move on commercial bills of lading?

A. Yes, sir, it does.

Q. And does Boeing control the routing?

A. Yes, sir, they do.

Q. And do you have any terminal facilities at Indianapolis, the origin point of the instant traffic?

A. No, sir, we do not.

Q. Now, when the shipper wants service from Indianapolis to Wichita do you deadhead your equipment to Indianapolis?

A. Yes, sir, we do.

Q. Now, have you transported any other commodity except landing gear bulkheads from Indianapolis to Wichita for Boeing?

A. I don't believe we have.

Q. And in your direct testimony when you were mentioning the product or the commodity you always referred to landing gear bulkheads?

A. Yes, sir.

Q. And all of these photos that have been introduced in [fol. 117] evidence show only landing gear bulkheads?

A. Yes, sir.

Q. And do you propose under the operation here to transport any other aircraft assembly other than landing gear bulkheads?

A. We propose to transport any product, airplane assemblies, that Boeing wishes us to transport. Our temporary authority calls specifically for landing gear bulkheads.

Q. Well, are these trailers and shipping fixtures and so forth suitable for the movement of any other aircraft assembly other than landing gear bulkheads?

A. The shipping fixture is definitely not. There is a little room at the extreme front of the trailer, and there is about eight feet in the front and about four feet in the back that smaller components could be carried, but they are not at this time.

Q. Now, if the carrier provided his own winch or crane,

could it be possible to load these items on fixtures through the overhead method of loading?

A. We have found that H. & B., the very limited space they had where the part was loaded, that there just wasn't room to do it.

Q. You are speaking of a crane that would not be located on the piece of equipment?

A. That's right; there just wasn't room to have a portable crane in where the parts were loaded.

Q. Who owns the tracks that are shown in these photographs?

A. The tracks?

[fol. 118] Q. Yes.

A. That is owned by J-T Transport.

Q. And how long did it take you to design and build this special trailer and fixtures?

A. I believe it took about two weeks.

Q. And how much advance notice did you have of this movement to design and build these fixtures and trailer?

A. About two weeks.

Q. And were you furnished blueprints by Boeing to aid you in the installation of these fixtures in the special trailer?

A. It wasn't necessary since our terminal is located at Wichita and our people were able to go in the plant and obtain the necessary measurements that they needed.

Q. Is there any reason why another aircraft part hauler couldn't design and build the same items?

A. We haven't seen any other aircraft hauler design this type of fixture before.

Q. No other aircraft hauler was asked to do it?

A. Well, I don't know.

Q. And you have only transported fourteen loads of these landing gear bulkheads in the past three or four months, is that correct?

A. I believe that's right, sir. It's running about four loads a month.

Q. You mentioned that you have at present an existing [fol. 119] contract covering the proposed service, particularly with reference to the present operation and under temporary authority, is that correct?

A. Yes, sir.

Q. And does that present contract specify a minimum

amount of traffic that will be tendered to you on an annual basis?

A. Yes, sir, it does; it specifies a minimum amount over the period of the contract.

Q. Then the contract assumes that you will be granted permanent authority?

A. I believe the contract says that this contract is valid only if J-T obtains the necessary operating authority.

Q. And am I right in saying that the shipper, the H. & B. Machine Company loads and the Boeing Company unloads the subject traffic?

A. Yes, sir.

Mr. Sullivan: That's all.

By the Examiner:

Q. How much does it cost to construct this special equipment?

A. The trailer, Mr. Examiner, we had the special elevator, which was a new deal for us, and I believe it cost around $1,500. The fixtures, as I remember, cost $465.00 each, and there would be four fixtures to a trailer.

Exam. Cunningham: Any redirect?

Mr. Mc Hendrie: May I ask a question, please?

[fol. 120] Exam. Cunningham: Surely.

By Mr. McHendrie:

Q. Mr. Cooper, when was this special equipment first available for use, approximately?

A. It has been a little over three months.

Q. Now, as I understood you at one point in your testimony, you referred to the period of years that you had been transporting these parts.

A. We have been transporting airplane components over a period of years. These particular parts we have been transporting, I believe it is, just about four months.

Q. None of these particular parts prior to that time then?

A. That's right.

Q. Do you know whether or not any other carrier transported these particular assembly parts to Boeing prior to your first shipment?

A. I believe some were transported by railroad. The traffic manager from Boeing is here, and I am sure he could testify much better on that than I could, sir.

Q. You don't have personal knowledge on that?

A. No, I don't believe I do.

Q. What is the duration of your contract, just for one year?

A. Our contract has a thirty-day written cancellation clause on either party, and it runs until cancelled.

Q. Do you know whether or not this particular unit is for a particular type of plane? I notice the exhibit says [fol. 121] B-52, and that's only for a B-52?

A. It's for a B-52, yes, sir.

Q. And presumably your contract will run only so long as Boeing manufactures this particular type of plane, is that right?

A. That contract would, yes, sir.

Q. And your equipment is adapted to the use in transportation only of this particular part?

A. The equipment that is used for this operation is for this one particular part. We own about fifty trailers and they are all different sizes and configurations, and we feel that we can design a trailer to haul any part that isn't too big to be transported over the highway.

Mr. McHendrie: However, that is not a matter within this particular application today. I think that's all.

Redirect examination.

By Mr. Wrape:

Q. Is the B-52 a classified ship?

A. Yes, sir, it is.

Q. Have your employees been cleared for handling classified commodities?

A. Yes, sir, we have.

Mr. Wrape: That's all.

Exam. Cunningham: Anything further?

Mr. Sullivan: I have two questions on that last item.

Exam. Cunningham: All right.

[fol. 122] Recross-examination.

By Mr. Sullivan:

Q. With what agency of the government have you been cleared for security?

A. Through the air force. I beg your pardon, it's the Defense Department.

Q. The Defense Department?

A. Yes, sir.

Q. And when you say that this is a classified item, you mean it is classified secret or confidential or what?

A. We are classified as to secret.

Q. You are classified as to secret?

A. Yes, sir; that is one notch higher than confidential, and as to just what classification this is I couldn't tell you, sir.

Mr. Sullivan: That's all I have.

Mr. Wrape: That's all.

Exam. Cunningham: That's all, thanks.

(Witness excused.)

Exam. Cunningham: We will take a five minute recess.

(Recess taken.)

Mr. Wrape: Mr. Solomon, please.

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Ernest T. Solomon was duly sworn and testified as follows:

Direct examination.

By Mr. Wrape:

Q. Can we have your full name, sir?

[fol. 123] A. Ernest T. Solomon.

Q. And where do you live?

A. At 1714 Windsor Road, Wichita, Kansas.

Q. And with whom are you connected?

A. Boeing Airplane Company, Wichita Division.

Q. And what position do you hold with that company?

A. Traffic manager.

Q. And how long have you been connected with it?

A. I have been with Boeing Airplane Company approximately nine years. I was assistant traffic manager—in 1952 I became assistant traffic manager, and in 1956 I became traffic manager for Boeing.

Q. Now, are your duties generally those of a traffic manager?

A. Yes, sir.

Q. And the problems of routing material at Wichita for Boeing are your problems?

A. Yes, sir.

Q. Is it up to you to arrange for transportation?

A. It is.

Q. Now, are you familiar with the application that is here being presented to the Examiner?

A. Yes, I am.

Q. At whose request was this application filed?

A. At Boeing's request.

Q. Were you present when Mr. Cooper testified?

[fol. 124] A. Yes.

Q. Did you hear him state that at the present time the applicant had temporary authority to transport the commodity that was here involved?

A. Yes, I did.

Q. And at whose request was that temporary authority secured?

A. Boeing's request.

Q. And did Boeing support the applicant in securing that temporary authority?

A. Yes, we did.

Q. And is that your purpose in being here today?

A. It is.

Q. Now, Mr. Solomon, would you tell us what is the commodity that is illustrated in the exhibits that have been identified by the witness?

A. This is landing gear bulkhead for the B-52 jet bomber that is manufactured by our plant at Wichita, Kansas.

Q. Is your company the prime contractor for that plane?

A. Yes, they are.

Q. And your contract is with who?

A. The United States Air Force.

Q. And about how long has the B-52 jet bomber been in production?

A. Approximately two years.

Q. Now, I believe the number of planes under your con- [fol. 125] tract is a classified matter?

A. It is.

Q. Now, could you give us the exact dimensions of the bulkhead that is here involved?

A. The dimension of these assemblies are 122.5 inches by 181 inches by 24.75 inches. That is the aft bulkhead.

The forward bulkhead is 128 inches by 90 inches by 42 inches.

Q. And could you tell us what each of them weigh?

A. The aft bulkhead weighs 1340 pounds, and the forward bulkhead weighs 1380 pounds.

Q. That would give the truckload a gross weight, cargo of about 5500 pounds?

A. Approximately.

Q. Now, could you tell us of what material those bulkheads are made?

A. Those are made primarily of aluminum. There are some other metals involved. I am not sure, but I believe it is titanium and possibly magnesium.

Q. And could you tell us the value of each of these components?

A. The aft bulkhead is valued at $24,690, and the forward bulkhead is $23,955.

Q. Now, would you tell us whether or not these bulkheads are susceptible to damage from contact, strain and stress?

A. They are very susceptible to that type of damage. They are very close tolerance items that have been built [fol. 126] to exacting specifications. They go immediately into the main body section of the aircraft at our plant at Wichita and they have to fit perfectly into that component part, or we have trouble.

Q. Now, are these commodities when received at your plant at Wichita subject to any kind of inspection?

A. They are subject to very rigid inspection by both our Boeing inspectors and Air Force inspectors.

Q. Now, if there is any material damage what do you have to do?

A. A case of that kind, depending on the nature of the damage, if it was very substantial damage or of any nature that required putting the part back into the original jig, it would have to go back to Indianapolis.

Q. You mean the manufacturing jig?

A. The manufacturing jig.

Q. Do you maintain at Wichita a duplicate set of manufacturing jigs?

A. Not for this particular part.

Q. Now, is this particular part manufactured to be put in stock, or is it manufactured for a particular airplane with a particular serial number?

A. These parts are manufactured for a particular aircraft unit that is under way in production at our plant at Wichita.

These parts must come in and be scheduled right into our production line on a very close schedule, and it is of the highest importance that these assemblies reach our [fol. 127] plant at the predetermined time so as not to slow up or stop our production line.

Q. And it is manufactured for a given airplane that has a particular serial number?

A. That is right, sir.

Q. You just can't put this bulkhead on another B-52?

A. No, due to engineering changes and that type of thing each part, or this particular part has to be specified for a particular serial number and aircraft.

Q. Now, if there was a delay at Indianapolis in production or a delay in transportation and the unit arrived in Wichita late, what do you have to do about your assembling?

A. Well, that would be an out-of-sequence installation which in some cases if it could be done would be very expensive to us, cost us many, many times more money to put this part in out of its proper place as it would to put it in the aircraft at the point it is supposed to go into it; and there is a limit on this particular part where the production line could be stopped cold, because it goes into the major body section of the airplane, and they have to have that in there before they can build that.

Q. What is the function of the bulkhead?

A. The main landing gear is attached to this bulkhead, the B-52 bomber.

Q. Now, on the occasion of the manufacture of the trailer [fol. 128] the designing of the trailer and the jigs, did your engineering department approve the shipping fixtures as well as the trailer?

A. Yes, sir, they did.

Q. Are you familiar with the facilities of the manufacturer at Indianapolis?

A. I have not seen the facilities myself. My assistant was up there, however, at the initial loading of these parts, and gave me a fairly accurate description of the situation.

Q. Are you familiar with the fact that the applicant maintains a terminal in Wichita?

A. Yes, I am.

Q. And would you tell us how frequently your office and their office at Wichita are in contact?

A. I would say that we are in daily contact and sometimes many times each day.

Q. And are their personnel, their supervisory personnel at Wichita permitted in your plant?

A. Yes, they are.

Q. Now, have you used any other form of transportation in the movement of any of these units?

A. Yes, prior to the time that we asked J-T Transport to haul them we shipped these by railroad.

Q. And were they shipped uncrated?

A. They were shipped in a returnable crate that was [fol. 129] loaded on flatcars.

Q. Now, do you recall the cost of that crate?

A. Yes, sir, just a minute and I will have that here for you.

The container was valued or cost $1,552 each.

Q. And do you know what the cost would have been to your company if you would have continued to use those crates?

A. We have made some calculations on the savings that we have realized by the use of the J-T special equipment and by switching from the returnable container shipped on railcars to the J-T special equipment. We estimate that we will save about 11,570 man hours in the handling of

these parts at both our plant and at H. & B. This figure is for both plants.

Q. Now, is that a saving in man hours related to the crating and uncrating?

A. Yes, it is.

Q. Now, did you——

A. Pardon me, primarily it is to the crating and uncrating. That answers your question.

Q. Now, did you make any computations with respect to the money that was involved in using the returnable crate as compared to the shipping fixture?

A. Yes, let's see here. The returnable type containers, both for the forward and aft landing gear bulkheads cost $2,984. The total aggregate cost for the entire contract we estimate to be around $53,717, which includes replacement [fol. 130] and the maintenance factor, and then on top of that there is a cost to return these containers back to the manufacturer of the landing gear bulkheads at Indianapolis, and the cost of this freight would be approximately $16,541.

Q. Now, do you have a picture of the component in the crate that was used in the rail shipments?

A. Yes, I do.

Mr. Wrape: May this picture be marked for identification as exhibit 11?

Exam. Cunningham: It will be identified as exhibit 11.

(Photograph was marked applicant's exhibit No. 11, Witness Solomon, for identification.)

Q. You have before you exhibit 11. Tell us what that is.

A. This is a picture of the returnable container that was formerly used in the shipment of the B-52 landing gear bulkhead.

Q. Is this the crate for the aft bulkhead?

A. Yes.

Q. Now, when you effected this manhour savings did that have any effect on your contract with your vendor at Indianapolis?

A. Yes, it did. We were able to secure a reduction in the price of the landing gear bulkhead that was equal to the man hours saved by this use of J-T special equipment.

Q. Now, under your contract with the United States Government are you subject to renegotiation?

A. Yes, we are.

[fol. 131] Q. And will that saving in that fashion be passed on to the government?

A. In a sense.

Mr. McHendrie: I will object to that; that is purely speculative.

Mr. Wrape: I will withdraw the question; I think it is speculative, too. I trust it will, though.

Q. Now, have you had any damage in the use of the applicant's service on this commodity?

A. Not on this commodity.

Q. How long has the applicant been serving you?

A. We have been using the J-T Transport Company since June the 1st 1952.

Q. How many loads of aircraft components have they transported for you in that time?

A. As of May the 17th 1957 they have transported 2,113 loads.

Q. And on how many of those loads did you file claims for damage?

A. There were four damage claims during that time for a total of $169.75.

Q. That was the total amount of the claims?

A. For all four claims.

Q. Now, do you understand that the applicant here is a contract carrier?

A. Yes, I do.

[fol. 132] Q. Did that fact mean anything to you in determining to bring about the filing of this application and your support of the application?

A. Yes, it did, because we recognized that the contract carrier can dedicate equipment to our service, the type of equipment that we want, and we feel that on this type of a transportation it is the best thing to have the equipment solely dedicated to our use.

Q. Now, do you use in the transportation of other commodities common motor carriers?

A. Yes, we do.

Q. Do you use rail lines?

A. Yes, we do.

Q. And do you understand the factors that are involved in their service?

A. Yes.

Q. You have contact with them daily with respect to their operations?

A. Yes.

Q. Does the maintenance of the terminal by J-T at Wichita mean anything to you?

A. It means very much to us inasmuch as the type of operation that they conduct in hauling these various components for us, we find the daily coordination that we are able to have with the J-T employees at Wichita is very [fol. 133] helpful to us, and is, I would say, necessary to the successful operation of this type of service.

Q. Is time in transit of any importance to you?

A. It is of very much importance to us.

Q. Tell us why.

A. Normally in manufacturing airplane parts there are many, many engineering changes that must go into each unit. As these engineering changes are incorporated they have to lock them out so far down the line, and if you have a longer transit time it takes you that much longer to get these changes into the picture. In other words, these changes mean an improvement on the airplane, and if we have a longer transit time it takes us that much longer to get these changes into our aircraft that we are rolling off the production line.

Q. Now, in your use of J-T service on this particular operation, do you tell them when to go get the load?

A. Yes, we do.

Q. Mr. Cooper testified that he had a unit that was stationed at Wichita that he sent to Indianapolis on your command, is that true?

A. That is true.

Q. Do you know whether or not the employees of J-T have been cleared for security?

A. Yes, they have been cleared.

Q. Is that required of this particular operation?

[fol. 134] A. I would say it is, because they could run up against an item that would be of a secret classification, and they do have access to—by designing the fixtures for some

of these parts they might have to have access to some of the drawings that are of a classified nature.

Q. Are they in and about your plant, too?

A. Yes, they are.

Q. Now, how do you regard the J-T Transport Company in your scheme of operations?

A. Well, we feel they are just merely a part of our production line in that we can schedule the parts right from our manufacturer, and the shipments are moved right into our receiving area and through the inspection and right on into our production, so they are actually just an extension of our production line.

Q. And will you tell the Examiner whether or not Boeing believes that it needs the service here proposed in order to successfully complete its contract.

A. We feel we definitely need this type of service to furnish or build the best type of aircraft that we can for the United States Air Force.

Q. You gave us a figure as to estimated man hours savings. Do you have the corresponding money savings?

A. I am sorry, I don't; I didn't have that calculated. It would be several thousands, though, I assure you.

Mr. Wrape: I will offer exhibit 11 and I will tender the witness for cross-examination.

[fol. 135] Exam. Cunningham: Any objection to exhibit 11?

Mr. Brooks: No objection.

Mr. Sullivan: No objection.

Exam. Cunningham: Exhibit 11 will be receivable in evidence.

(Applicant's exhibit No. 11, Witness Solomon, for identification, was received in evidence.)

By the Examiner:

Q. Is your plant in Wichita located in the city limits of Wichita?

A. No, sir, it isn't; it is just outside the city limits about a mile or two.

Q. Is the plant at Indianapolis located within the city limits of Indianapolis?

A. It is my understanding it is.

Q. Is there any other airplane factory at Wichita besides Boeing?

A. Yes, sir, there is the Beech Aircraft Corporation and the Cessna Aircraft Company.

Q. How large is Wichita?

A. It is about 220,000.

Exam. Cunningham: Cross examination.

Cross-examination.

By Mr. Brooks:

Q. Sir, you are not aware of where Beech Aircraft obtains its parts? You wouldn't know whether they come from Indianapolis or some other town, would you?

A. Normally I wouldn't, no, sir.

[fol. 136] Q. Sir, you said that the aft section weighed about 1340 pounds, the forward section weighed 1380 pounds, and when Mr. Wrape asked you for the total cargo weight, 5500 pounds, you indicated yes. Was that correct?

A. That would be on the load of two fixtures. That would be about right, I would say. I would have to calculate it.

Q. What I am getting at, it is incorrect because you haven't taken into account the weight of the carrier for these parts, is that not so?

A. That is not so. That is part of J-T's shipping fixture, and we do not take that into account in billing these parts.

Q. Well, what I am getting at, we are talking about the weight of the shipment, and the shipment including these carriers made out of pipe, would they exceed 5500 pounds, would they not?

A. I am sure it would.

Q. Yes, sir. And then in addition there would be the other accessory equipment of the tracks and various other items on the trucks, is that right?

A. The only thing I know of would be the spare and the tracks and this elevator equipment that is used.

Q. Now, sir, you had nothing to do with the engineering of this particular piece of equipment belonging to J-T, did you?

A. We approved the design.

Q. When you say "we" you are referring to someone else other than yourself in Boeing Aircraft Company?

[fol. 137] A. I approved the design as well as our engineering group and our two design groups. Three agencies in our plant have to sign off on these drawings.

Q. With reference to exhibit 7, the roof of that truck is detachable from the truck itself, is it not?

A. Yes, it is.

Q. The equipment, that is, the commodity sought to be transported here, could just as easily be loaded on a rail with a snatchblock or gantry just as easily as having an elevator, could it not, sir, if you know?

A. Well, I would have to see the design of just what you have in mind to say whether it could be loaded just as easily or not.

Q. Well, sir, if you had on exhibit 7 a rack which would roll down the sides or a monorail down the center and a snatchblock or gantry which would lower these units holding the bulkheads into the lower portion of the floor, that would be satisfactory, just as good as the elevator, wouldn't it?

A. I wouldn't say it would be as good. I would prefer the elevator for that type of thing. You don't have near the control over letting the parts down into the well of the truck, I would say, with the overhead facility there. You would be lowering them by a pulley method on a block and tackle, or something of that nature, down into the well. I would prefer this arrangement, personally.

Q. Well, sir, now the H. & B. Company does the loading [fol. 138] at their plant in Indianapolis. You do not perform that operation, do you?

A. That is right.

Q. So then it would depend on what would be satisfactory with them, and assuming that the articles arrive safely without breakage then that would be the real test, would it not, sir?

A. I would say this, that H. & B. American are very well satisfied with this.

Mr. Brooks: Just a minute. I will object to anything that H. & B. may be satisfied with, Mr. Examiner.

Exam. Cunningham: Strike the last part of the answer.

Q. Who was the last traffic manager for Boeing Aircraft?

A. Fay L. Eldridge.

Q. Is he still with your firm?

A. Yes, he is.

Q. Pardon me, sir. Is that Boeing Aircraft or Boeing Airplane Company?

A. It is Boeing Airplane Company.

Q. I see, thank you. Now, are you acquainted with the Belger Cartage Service, Inc., with offices, terminal facilities, equipment in Kansas City, Missouri, and also Wichita, Kansas?

A. I am.

Q. I see. At the time you considered J-T Transport and requested them to make an application for temporary authority, did you give the Belger Cartage Service, Inc. [fol. 139] an opportunity to provide this service?

A. No, I didn't.

Q. You did not. You were aware, sir, and prior to that time your former boss and traffic manager, Mr. Eldridge, was aware that the Belger Cartage Service offered transportation to interchange between Indianapolis, Indiana and Wichita, Kansas, did you not, sir?

A. I was aware that they had offered their services; however, it was my understanding that they did not offer them directly to Mr. Eldridge, but to some other people in the Boeing plant.

Q. I see. Well now, if the Belger Cartage Service through interchange with Daniel Hamm Drayage Company could render a service using one track or trailer unit suitable in design to transport this commodity from origin to destination using the same driver, the same equipment, and with an overriding insurance cargo coverage to your firm, would there be anything wrong with that service, in your opinion?

A. Yes, there would. It would be a two-line haul even though the equipment might come all the way through. It would still be under the control of two different carriers, and to my knowledge I know of no experience that Belger Cartage has or their possible connections in the transporting of aircraft components, and especially fixtures and the experience of designing this type of equipment that is required.

Q. You do know, sir, of the special equipment of a very [fol. 140] similar nature to the instant equipment shown in the exhibits of the applicant, that the Daniel Hamm

Drayage Company also transports components and uses drop-frame trailers on the sides, which the base of the equipment is only some nine to twelve inches off the road, do you not, sir?

A. Yes, I know about one movement from, I believe it was St. Louis to Tulsa that they moved, used that type of equipment; however, I think that there again we would have a two-line haul from Indianapolis to Wichita, and as I said, I don't think that we can have the direct control over two carriers that is required to move these parts in the manner in which we want them moved.

Q. Yes, sir, but I assume, sir, that your company had some sort of emergency and that is why you made the original request of J-T to apply for an emergency authority, is that not correct, sir?

A. We had an emergency to this extent, that we wanted to get away from this bundlesome handling of the shipments in the returnable-type container at the earliest possible time.

Q. Yet you knew that by an interchange movement whereby one truck and trailer could be used, tractor-trailer could be used, that that service could be rendered through the Belger Cartage Service, Inc. with terminal office facilities and equipment right in Wichita where your firm has its main office, is that not so?

[fol. 141] A. I didn't know that it could be done. I knew that they have an office there, but I have had no experience with them transporting this type of part; and as I said, I have had no knowledge of experience that they have had in designing a fixture of this type.

Q. But, knowing that the transportation could be accomplished you still did not give them that opportunity to render the service and request a temporary authority through the J-T?

Mr. Wrape: I will object to the form of the question. I think it is argumentative.

Exam. Cunningham: The objection is sustained.

Q. Now, when you were figuring out this saving did you deduct the cost to Boeing Airplane Company of the four fixtures to hold the commodity being transported?

A. This savings that I mentioned, the man hours savings, is that what you are interested in?

Q. Yes, sir.

A. That is only the man hours savings. There was no material calculation, cost of fixtures involved in that.

Q. I see. You didn't even include the four racks that Boeing Airplane Company had to build because of this truck movement, is that right?

A. No, it is strictly a man hour savings.

Q. Now, you said that there was cost involved in returning the crates as set forth in exhibit 11. By the same token [fol. 142] the J-T equipment can only be used on this one movement, therefore the equipment must be returned from Wichita to Indianapolis in order to bring back another load, and in the return movement they have to also carry these racks back with them, do they not?

A. They carry the racks back empty.

Q. So, therefore, there is an expense involved to Boeing Aircraft or Airplane Company for that return movement, is there not?

A. I would say there probably is. It's in the over-all cost of the contract. It isn't set out as such.

Q. Yes, so when you indicated that the return empty cost by rail was $16,341, according to your estimate, in effect you are probably paying more to J-T to return the entire truck and the racks than it would to return the crates by rail, would it not?

A. I am sure that it would not.

Q. You don't think so.

A. No.

Q. But you haven't figured it out, I take it?

A. I haven't figured it out personally; I think my staff has.

Q. Now, sir, there was testimony here this morning that the vehicle used to transport these assemblies was a one-purpose vehicle and could not be used for any other purpose than transporting the commodity involved, and that is set [fol. 143] forth in exhibits 7, 8, 9, and 10, is that not so, sir?

A. That's right.

Q. Now, if a common carrier were to offer you trailer equipment of similar nature and operation as applicant has offered, why would you not be able to use the services of a

common carrier just as you would the services of a contract carrier?

A. Because the common carrier cannot dedicate his equipment exclusively to our service as a contract carrier can.

Q. Well now, sir, if equipment can only be used for one purpose and that is to haul this particular item, and were to be set off especially for your purpose, would that not be satisfactory, whether it was a common carrier or a contract carrier?

A. Well, I would like to clarify one point. I would say that the trailer could possibly be used to transport another commodity. The shipping fixtures inside of the trailer could not. I don't know that the trailer couldn't be used to transport another commodity, though, with the shipping fixtures removed.

Q. Well, sir, is that the main reason why you have requested the applicant to make this request for permanent authority, because he is a contract carrier as against a common carrier?

A. Not necessarily because he is a contract carrier against a common carrier, but because of the type of service that they perform over-all. The various aspects of it all being weighed, they seem to be able to perform the best type of service for what we want.

[fol. 144] Q. Are you acquainted, sir, with the fact that the Belger Cartage Service has some eight or nine drivers cleared, security clearances, as well as drivers for the Daniel Hamm Drayage Company, do you know that?

A. No, I don't.

Q. If that were the case then that would clear up the security point, would it not?

A. I would assume that that would take care of it, if they were the people that were involved required to have knowledge of this.

Q. Now, with reference to daily coordination and having an office terminal and facilities at Wichita, that would be no more true with the applicant than it would with the Belger Cartage Service, would it not, sir?

Exam. Cunningham: I think we are getting—aren't we getting into a lot of repetition here?

Mr. Wrape: I think we are.

Exam. Cunningham: We had that before and he said it

would be a two-line haul, and it didn't make any difference whether they had any facilities in Wichita or not if it was a two-line haul. I have heard that three times.

Mr. Brooks: I am trying to find out, sir, what would be wrong with the interchange movement if it was operated on one truck and one driver from origin to destination, and subject to coordination at the Wichita office of the Belger Cartage Service.

[fol. 145] Exam. Cunningham: You have already had that. He said he didn't want to use two lines, isn't that correct, sir?

The Witness: Yes, sir, that is right, Mr. Cunningham.

By Mr. Brooks:

Q. Have you had any bad experience in using either of these two carriers in that type of service?

A. No, sir.

Q. Is this item being transported set out on exhibits 8, 9, and 10, is that a classified item?

A. The part as to its shape and all is not a classified item. The exact performance of that part, performance characteristics on the B-52, it is all classified information.

Q. Now, one other thing, sir, and I am through. On any item shipped by or for and on behalf of the Air Force, all varying subject to weather damage, they are covered with a waterproof covering with some sort of cosmoline or protection, is that not so, sir?

A. I am not sure that that is the case; I can't answer that question.

Q. Well, in this exhibit, sir, exhibit 10, are the bearing parts there properly covered to protect them against the elements?

A. They are covered, but I would not be in a position to say that they are——

Exam. Cunningham: That is repetitious, too. We had that from the operating witness who received the shipments.

Mr. Brooks: I believe that's all.

[fol. 146] By Mr. Sullivan:

Q. Mr. Solomon, have you been authorized by your company to appear in support of this application?

A. I have.

Q. And who in the company authorized it?

A. Mr. Fay L. Eldridge.

Q. Who is the general traffic manager of the Boeing Airplane Company?

A. We have no general traffic manager.

Q. Who is in charge of your over-all traffic department then?

A. At Wichita?

Q. No, of the entire company.

A. We have no one over both the Wichita and the Seattle department, traffic department. They operate as independent groups.

Q. Would you say that your Seattle plant is your main plant?

A. The Seattle plant is where our general office is located. It is considered our main plant.

Q. And you do not have any officer in your general offices that is in charge of your entire traffic set-up?

A. I would say that we have headquarters' people in our headquarters division that are over both plants, for that matter, all jobs in both plants.

Q. Now, are you supporting this application for any aircraft assembly other than landing gear bulkheads?

A. I would prefer to see it granted for other parts due to [fol. 147] the fact that at various times we find it necessary to place additional work with some of our sub-contracts, such as H. & B. American, where they may be furnishing other parts to us. We find that oftentimes we start out maybe manufacturing with one part and then we will place other work in there if they do us a satisfactory job, and they do have the facilities to do the work; or quite often the nature of the part that they are manufacturing is completely, the requirement for it is eliminated, and in its place something else of a different nature might be placed in.

Q. But, do you know at the present time as a fact whether any other aircraft assembly will move from Indianapolis to Wichita except landing gear bulkheads?

A. As far as I know right now that is the only thing that will be moving from H. & B.

Q. And this will move during the rest of this prime con-

tract that is now in existence between Boeing and H. & B.?

A. Right.

Q. And can you tell us the termination date of that contract?

A. I believe our present contracts extend into 1959.

Q. '59?

A. 1959.

Q. Can you tell us anything about the expectant volume of traffic on a monthly or a yearly basis that will move under this contract?

[fol. 148] A. I would say that approximately four loads a month will move. It could vary to a great extent depending on how the Air Force schedules our production; but, it is my estimation that it will run around four loads a month right now.

Q. Does your company sub-contract this particular item to any other concerns?

A. The Wichita division does not sub-contract this item to any other concerns that I know of.

Q. Do you know whether H. & B. have contracts with any other aircraft manufacturer for this particular item?

A. I don't know that they do, but I am almost certain that they don't because the only other one that manufactures the B-52 bomber would be our Seattle division, and to my knowledge they are not manufacturing that part for Seattle.

Q. Now, taking into consideration your long experience in the field of traffic, is it not true as a general practice that the shipper provides the fixture or the container for the traffic that moves rather than the carrier?

A. That is the normal way common carrier traffic is handled, yes, I would say.

Q. How much advance notice did you have or your company have that this traffic was going to move from Indianapolis to Wichita?

A. Well, we had been transporting these parts for several months by railroad prior to the time that we changed over.

[fol. 149] Q. And when you changed over from rail to motor carrier did you make any investigation to determine whether there are any presently-authorized motor carriers able to perform service?

A. Yes, I made an investigation.

Q. And what did that investigation reveal?

A. I found that U.S.A.C. Transport, a common carrier, had authority to transport these commodities, but they did not have a Wichita office; and further our past experience with this company has not been the best. We had several unsatisfactory experiences with them both on some movements that they actually hauled and another case of where we tried to get them to set up a contract for us. The last experience on that was unsatisfactory.

Q. What year did this experience occur?

A. 1953.

Q. In 1953, and how many times did you use them in 1953?

A. I am not sure, but I would say two or three different loads were hauled in by them at that time.

Q. And what was the actual unsatisfactory experience with these particular loads?

A. The one load that I recall at this time came into our plant with the airplane part unbolted from the shipping fixture lying one of it or one edge of it lying down on the floor of the truck loose, and it was very apparent to us that in the first place the shipping fixture was not of an adequate [fol. 150] design to transport the part properly; and in another case, or another thing about it, it looked like the load was not inspected en route at all, or someone hadn't noted that it came unbolted and had fallen down on the floor.

Q. Now, was the liability for this damage the fault of the carrier or the shipper?

A. I cannot say as to that, because the part in question was shipped from the Oliver Corporation at Battle Creek, Michigan, and it was their responsibility to negotiate the settlement with the carrier.

Q. And was a claim for damages submitted?

A. I do not know that.

Q. You didn't pay the freight charges on that particular shipment?

A. I can't say; I can't answer that.

Q. How many unsatisfactory experiences in 1953 did you have?

Exam. Cunningham: It's no use going back that far; it is too remote anyway.

Q. Now, you have stated that your present contract with regard to the B-52 has been in effect for approximately two

years and rail has moved the landing gear bulkheads for approximately seven months. Did any other carrier move them during the period of the contract?

A. I would like to correct one thing. I said several months; I didn't give a specific time element. But, to my [fol. 151] knowledge the only shipments that we have moved in from H. & B. American Machine have been by railroad to the time that we moved them, started moving them by J-T Transport.

Q. And as long as this movement has been in existence you have had no damage experience one way or the other?

A. No, we haven't.

Q. With regard to delay in time of transit, would your company not receive more expedited service if the carrier performing the service had equipment stationed at Indianapolis rather than at Wichita, which involves the deadheading of equipment from Wichita to Indianapolis?

A. I don't believe that we would, because we know far enough ahead of time the exact schedule that these parties will move on, and we are able to schedule the movement in such a manner that the carrier has ample time; that is, J-T Transport has ample time to move their equipment to the shipper's dock in Indianapolis.

Q. Do you believe that the proposed operation could be handled by the overhead loading method of operation?

Exam. Cunningham: That's repetitious.

Mr. Sullivan: I didn't hear him answer the question before, but I will eliminate it. I am going to introduce this as an exhibit later on.

Q. I show you a picture of a U.S.C.A. trailer that is located—it's in our advertising brochure. Would it not be possible for that type of an underslung trailer to be used [fol. 152] to handle this traffic?

A. I would say no, because it apparently just has a tarpaulin over the top of that, and we found that very unsatisfactory for transporting these expensive components.

Q. Well, if a removable fixed top was installed in the top of that trailer, would that be suitable for your needs?

A. It appears it would be; I don't know what dimensions

that trailer is, but if the dimensions were proper and all it appears it could be possibly used.

Q. Now, on direct examination you referred several times to common carriers. By that do you mean what is known as a general freight carrier?

A. That is primarily what I had in mind, although I realize that it extends to specialized types of common carriers.

Q. Don't you realize that a specialized type of common carrier also dedicates equipment, if a request is made?

A. It is my understanding that a common carrier cannot dedicate equipment to a particular shipper, that he holds himself out to furnish that equipment to any shipper that wants it. That is my understanding.

Q. But if a common carrier had ample equipment with plenty of idle equipment, would it not be conceivable for that carrier to station a trailer at either Indianapolis or Wichita in order to provide the service desired?

A. It appears they could, yes.

[fol. 153] Q. Do you know the distance from Indianapolis to Wichita?

A. I think it is a little over 700 miles.

Q. And do you know if your company has been solicited for the involved traffic by U.S.A.C. Transport?

A. We have been solicited for the traffic.

Q. Do you know how many times?

A. No, I don't know exactly how many times.

Q. Did your engineering company or department help J-T in designing this trailer and installing the fixtures?

Mr. Wrape: That is objected to as being repetitious.

Exam. Cunningham: Objection sustained.

Q. Would your engineering company or department have any objection to assisting another motor carrier of aircraft parts to design a special trailer and install fixtures?

A. I would say they would have no objection to offering the same type of assistance to any carrier that we were considering for a movement.

Q. Does this traffic move on commercial bills of lading?

A. Yes.

Q. Is it later converted to government bills?

A. No, it isn't.

Q. Have you had any experience with any other motor carrier on transit time from Indianapolis to Wichita?

A. We have experience on regular common carriers that serve both Indianapolis and Wichita.

[fol. 154] Q. By "regular common carriers" you mean general freight carriers?

A. Yes, general commodities.

Q. Now, if this application was denied would your company try other aircraft part haulers?

A. I would have to make a determination on what else was available. We would no doubt have to move the traffic, but I am not sure how we would move it if this application is denied. I would have to figure out the next best way to move it considering all aspects of the thing.

Q. Is it not true that your support of this application is based on a preference for applicant based on a long period of close association with this carrier?

A. I would say that enters into it, but it is not necessarily the prime reason. We feel that they can give us this service, is the main reason that we are using it.

Q. Do you feel it is more economical to ship by a contract carrier than a common carrier?

A. In some cases it is; I would say that it isn't always the case.

Q. Is cost a controlling factor in your company's support of this application?

A. It's not controlling; let's say it is not the controlling factor.

Exam. Cunningham: Anything further?

[fol. 155] Mr. Sullivan: Yes, I have a few more questions.

Exam. Cunningham: Let's speed this up; we are wasting a lot of time here.

By Mr. Sullivan:

Q. Are you aware, Mr. Solomon, that U.S.A.C. transports substantial amounts of aircraft parts traffic for the United States Government?

A. I have been told that by your representative; I do not know it to be an absolute fact. I do not know the exact movements involved.

Q. And is your main reason for not using U.S.A.C. based on the instances you mentioned in 1953?

A. No, that is not the controlling thing. I would say the fact that they do not have the terminal at Wichita with people there that we can do business with on a day to day basis is a major factor to consider, and the other is the fact that their tariff says, for one thing, that they can exercise the control of the type of equipment that will be used on any particular movement in the U.S.A.

Q. Is that the recent tariff that went into effect on March 1st 1957?

A. Yes, I can give you the tariff reference on that. That is MFIC No. 30.

Q. Would the fact that U.S.A.C. has a terminal at Indianapolis overcome your objections to the absence of a Wichita terminal?

A. No, it would not, because the main coordination that [fol. 156] has to be done on developing a program of this nature has to be done at Wichita with our people. It cannot be performed with the shipper.

Exam. Cunningham: How much is one of these bulkheads worth?

The Witness: Approximately $24,000; $24,690 on the aft bulkhead.

Exam. Cunningham: Go ahead.

Q. Is it not true that this traffic moves on the Boeing bills of lading?

Mr. Wrape: I will object to that; it's the third time that he has been asked.

Mr. Sullivan: I withdraw that question. That's all I have.

Exam. Cunningham: Do you have any questions?

Mr. McHendrie: Just a few.

Exam. Cunningham: Off the record.

(Discussion off the record.)

Exam. Cunningham: Back on the record.

By Mr. McHendrie:

Q. Mr. Solomon, you stated that this B-52 has been in production for two years?

A. Approximately.

Q. During all of that period has this particular component been moving from Indianapolis to your plant at Wichita?

A. No, it hasn't.

Q. When did the first movement start?

A. The record I have prepared here shows the first ship-
[fol. 157] ment was made on November the 29th 1956.

Q. That was a rail movement?

A. This was a rail movement.

Q. And you continued with the rail movements up until you began using the present applicant, is that correct?

A. That is right.

Q. And these shipments were shipped in this crate, this type of crate as shown in exhibit 11?

A. Yes, sir, that's it.

Q. Did your company own those crates?

A. Yes.

Q. You testified as to the investment in that of approximately $1,550 apiece?

A. Yes, sir.

Q. And that investment was made and your company had the crates on hand at the time the truck movement started, is that right?

A. There was a certain amount of those on hand. We would have had to build a lot more to handle the program as it builds up.

Q. And as far as these fixtures are concerned in which the movement is not made, those are built and owned by the applicant, is that correct?

A. That is right; that is, there is a portion of them that are owned by the applicant. There is a portion of them——

Exam. Cunningham: That is repetitious; we have had it three times that the applicant owns four and Boeing owns
[fol. 158] four, is that right?

The Witness: That's right, sir.

Q. You have no reason to believe that the cost of those fixtures is not included in the contract price charged to you, however?

Exam. Cunningham: How would he know that?

Mr. McHendrie: Well, sir, the applicant's witness this morning testified that he is——

Exam. Cunningham: We don't have anything in the record as to what the applicant even charges him, so how

would he know whether that was included or not? It is obvious that it is; he is not doing it for nothing.

Mr. McHendrie: Very well, sir.

By Mr. McHendrie:

Q. Is your principal objection to the use of these crates then the time spent in crating and uncrating?

A. That and the cost of maintaining them. We have had a tremendous damage factor on the outside covering of those crates that have had to be replaced on the shipments that we made by rail, and it was quite a costly factor.

Q. Damage to the crates?

A. Damage to the outside of the sheet metal covering.

Q. Mr. Solomon, do you know whether or not your company had any discussions with representatives of the railroads as to whether any more satisfactory container of a more permanent type could be devised and used in rail transportation?

A. I have had some conversation with some of the rail- [fol. 159] roads regarding possible use of special shipping fixtures on the rails, but we found that the railroads could not provide the service that J-T Transport could provide.

Q. They could provide or would provide such special equipment, would they?

A. They would not provide the equipment. In most all cases when railroads use specialized transportation equipment they do not provide the fixtures. The applicant usually has to make the fixtures, or the shipper.

Q. In this particular case was there not a possibility that special fixtures could be made and provided for this particular commodity?

Exam. Cunningham: By the railroad?

Q. By the railroad.

A. Yes, they could have been made by the railroad.

Q. So that this particular objection you have as to the use of these crates could have been eliminated?

A. That particular objection could possibly have been eliminated by the use of rail, but it still wouldn't provide the service.

Exam. Cunningham: You would still have to pay for the container, wouldn't you?

The Witness: Yes, we would.
Exam. Cunningham: Go ahead.

Q. But, the elimination of man hours in crating, the man hours in crating and uncrating which you said was your [fol. 160] primary objection, those could have been eliminated or reduced?

A. It could have been—you are speaking of rail special equipment?

Q. Yes.

A. It could have been.

Q. And you have stated that cost as far as return freight is not the controlling factor in your decision?

A. It is not the controlling factor.

Q. Mr. Solomon, you have testified, I believe, that you considered the applicant with this particular type of equipment as really a part of your production line, is that correct?

A. That's right.

Q. You had no objection to rail transportation as far as regularity or reliability of schedule is concerned, do you?

A. Not as to the reliability necessarily, although we find that we cannot control the movements nearly so well as we can by a contract motor carrier. We do not have the exacting control over rail shipments, and we have a great number of special equipment shipments moving in rail service at this time that is too large to move by truck.

Q. You heard the applicant's testimony that there is this one vehicle number 338 on exhibit 4 which is arranged as illustrated by the exhibits and devoted to this particular movement, is that correct?

A. That's right.

[fol. 161] Q. You know, do you not, that any motor vehicle these days is subject to highway accidents, breakdown, becoming inoperable with no notice at all, do you not?

A. Let's say that the past experience with J-T Transport, we have had very little of that.

Q. Nevertheless, it is possible?

A. It is possible.

Q. The production line on these B-52 bombers depends on the continuing operability of one motor vehicle?

A. That's right.

Q. And if that should be in a wreck and should be out, then I suppose you would call the rails in a hurry, would you not?

A. I imagine that the J-T Transport Company would get another piece of equipment in service pretty fast in case anything like that happened.

Q. Then this particular type of vehicle and equipment is not necessarily the only kind that would be available for this transportation, is that right?

A. I would say that it is the only kind that can transport it as it is being transported now. They would have to build another set of shipping fixtures, and, of course, we would have an extra set of shipping fixtures here available. All they would need would be another truck and trailer.

Q. And the rail cars are available at any time, are they not?

A. I would say that generally speaking we have a fairly [fol. 162] good supply of rail cars, although that has been a problem in the last few months, the rail car supply.

Mr. McHendrie: I think that's all.

Exam. Cunningham: Any redirect?

Redirect examination.

By Mr. Wrape:

Q. Mr. Eldridge has been mentioned. What is his position now?

A. Mr. Eldridge is now an assistant warehouse manager for Boeing Airplane Company, Wichita Division.

Q. Have you had an opportunity to compare the time in transit on your rail shipments as compared to your J-T service?

A. Yes, rail shipments ran from three to seven days in transit, and on the J-T Transport shipments all of them, with the exception of one, were in Wichita the next day after they left Indianapolis.

Q. Now, does Belger serve you at Wichita?

A. Let's say they come into Wichita and have a terminal there. I do not know of very few things that we have actually used them for. They have been used more as a rigger or erector and that type of thing.

Q. And not in moving airplane components?

A. To my knowledge we haven't used them at all.

Q. Is it Boeing or is it the company in Indianapolis that controls this traffic and pays the charges?

A. Boeing Airplane Company, Wichita Division, controls [fol. 163] the routing and pays the transportation charges.

Q. And if the permit is granted will Boeing enter into a contract in accordance with the Commission regulations?

A. We will.

Mr. Wrape: That's all.

Exam. Cunningham: Any recross? (No response.) That's all, thanks.

(Witness excused.)

Exam. Cunningham: We will adjourn for lunch until 1:30.

NOON RECESS AND AFTER

(Whereupon at 12:30 p.m., a recess was taken until 1:30 p.m. of the same day.)

[fol. 164] AFTERNOON SESSION 1:30 P.M.

Exam. Cunningham: Are you ready to proceed?

Mr. Solomon: Yes, sir.

Exam. Cunningham: Call your witness.

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MARTIN A. DECKER, was duly sworn and testified as follows:

Direct examination.

By Mr. Sullivan:

Q. Will you state your name and address?

A. Martin A. Decker, 7434 West Otter Drive, Detroit 35, Michigan.

Q. And with what company are you associated?

A. U.S.A.C. Transport, Inc.

Q. And in what capacity?

A. In charge of fleet control and general overall operations.

Q. And how long have you worked for U.S.A.C. Transport?

A. Since 1941.

Q. And what have been the positions you have held in this organization?

A. All the way from terminal manager, traffic manager, general supervision of all operations, some in tariffs.

Mr. Sullivan: May I have this certificate of U.S.A.C. marked for identification, Mr. Examiner?

Exam. Cunningham: It will be marked as exhibit 12.

(Document was marked protestant's exhibit 12, Witness Decker, for identification.)

Mr. Sullivan: May I have this terminal list of U.S.A.C. [fol. 165] Transport marked as an exhibit.

Exam. Cunningham: It will be marked as exhibit 13.

(Document was marked protestant's exhibit 13, Witness Decker, for identification.)

Mr. Sullivan: May I have this list marked "Equipment Distribution by Terminal" marked for identification?

Exam. Cunningham: It will be identified as exhibit 14.

(Document was marked protestant's exhibit 14, Witness Decker, for identification.)

Mr. Sullivan: May I have this list marked "Equipment Available" marked for identification?

Exam. Cunningham: It will be identified as exhibit 15.

(Document was marked protestant's exhibit 15, Witness Decker, for identification.)

Mr. Sullivan: May I have the advertising brochure of U.S.A.C. Transport marked for identification?

Exam. Cunningham: It will be identified as exhibit 16.

(Document was marked protestant's exhibit 16, Witness Decker, for identification.)

By Mr. Sullivan:

Q. Mr. Decker, looking at U.S.A.C.'s certificate of public convenience and necessity, will you point out therein the authority under which U.S.A.C. would perform the service?

A. It would be under MC 108068, Sub 12, dated January the 18th 1950.

[fol. 166] Q. What does that state, roughly?

A. It's points and places east of the Mississippi and points west of the Mississippi on aircraft component parts, crated and uncrated.

Q. Turning to U.S.A.C.'s terminal list, will you point out therein, the terminals from which U.S.A.C. would perform the proposed service?

A. In the first column it would be the next to the bottom, Indianapolis would cover the shipping point. Anything from Wichita would either be covered from Dallas or Topeka, Kansas.

Q. Now, on the equipment available May 15, 1957, will you point out therein which equipment would be used by U.S.A.C. to perform the proposed service?

A. Let me see what list you are looking at.

Q. Equipment available, May 15, 1957.

A. Excuse me. In the list of five semi-trailers, open-top vans, it's the sixth article down. There are two trailers which are identical with the one shown in the brochure in the middle page. I merely referred to this one right here (indicating).

Q. Are you pointing to the advertising brochure of U.S.A.C. Transport?

A. Right.

Q. And that's the second photograph?

A. Right, it's identified in the brochure.

Q. Taking into consideration Mr. Solomon's testimony [fol. 167] here today how would U.S.A.C. perform the service requiring this type of trailer?

A. It would be modified to carry the necessary fixtures and also to install what he termed as being necessary a roof that would be removable or go up and down with his fixture.

Q. And how would U.S.A.C. perform the loading and unloading?

A. Well, that would depend entirely on what facilities are available at the loading point.

Q. Would U.S.A.C. perform the type of loading service that is now provided by J-T and the H. & B. Company by use of the fork lift truck?

A. Yes, we could.

Q. Now, how would you do that?

A. By building fixtures adaptable to the equipment to be transported and loading in the same procedure that they are loading right now.

Q. Has U.S.A.C. transported similar types of aircraft parts in the past in this type of equipment?

A. Similar in size or in the specific commodity?

Q. Delicate and fragile aircraft parts?

A. Definitely we have.

Q. And has U.S.A.C. had experience in installing fixtures?

A. We have.

Mr. Sullivan: May we have this identified?

Exam. Cunningham: It will be marked as exhibit 17.

[fol. 168] (Photograph was marked protestant's exhibit 17, Witness Decker, for identification.)

Q. Will you look at this photograph identified as exhibit 17, and will you describe that?

A. The roof on that is removable in two sections, and both ends are removable for loading and unloading purposes.

Q. Is that overhead loading?

A. Yes.

Mr. Sullivan: May I have this photograph marked for identification?

Exam. Cunningham: It will be identified as exhibit 18.

(Photograph was marked protestant's exhibit 18, Witness Decker, for identification.)

By Mr. Sullivan:

Q. Will you look at exhibit No. 18, Mr. Decker, and tell us what that is?

A. That is the same unit when the ends and the roof are removed and the component parts are loaded in place ready for transit.

Q. And what is the commodity being transported?

A. Those are parts to the B-36 that were transported from Nashville, Tennessee, to Fort Worth, Texas.

Q. And what specific part?

A. Flaps.

Mr. Sullivan: May I have this list marked regular run shipments from La Porte, Indiana, to Tulsa, Oklahoma, marked for identification?

[fol. 169] Exam. Cunningham: It will be identified as exhibit 19.

(Document was marked protestant's exhibit 19, Witness Decker, for identification.)

Q. Will you look at exhibit No. 19, Mr. Decker, and tell us what that depicts?

A. That represents movements that were made on ailerons for the B-47. There is only enough of them listed here to show that the movement was accomplished. There was many more than this and it was for the Whirlpool Corporation at La Porte, Indiana, to the Douglas Aircraft at Tulsa, Oklahoma.

Q. What type of equipment was used and what was the specific part?

A. It was removable-roof vans and the fixtures were built in such a way that the roof could be removed. They could either be loaded through the roof or they could be loaded through the back end.

Q. And did your company install the fixtures on these vans?

A. We had them installed.

Mr. Sullivan: May I have this list marked "Regular Run Shipments from La Porte, Indiana, to Marietta, Georgia" marked for identification?

Exam. Cunningham: It will be identified as exhibit 20.

(Document was marked protestant's exhibit 20, Witness Decker, for identification.)

Q. Will you tell us, Mr. Decker, what exhibit No. 20 depicts?

[fol. 170] A. That is a list of movements that were from La Porte, Indiana, to the Lockheed Aircraft at Marietta, Georgia. They were flaps for the B-47 also.

Q. And what type of equipment?

A. The same type of equipment that was used on the Tulsa. They had removable roofs and could be loaded either through the roof or through the back end.

Mr. Sullivan: May I have this list marked "Regular Run Shipments from Evansville, Indiana, to Farmingdale, New York," marked for identification?

Exam. Cunningham: It will be identified as exhibit 21.

(Document was marked protestant's exhibit 21, Witness Decker, for identification.)

By Mr. Sullivan:

Q. Will you tell us, Mr. Decker, what exhibit No. 21 shows?

A. That is a list of movements from Evansville, Indiana to the Republic Aviation at Farmingdale, Long Island. It was wing panels and component parts with special fixtures built into the trailer which were not removable.

Mr. Wrape: What airplane was that?

The Witness: Pardon?

Mr. Wrape: What airplane?

The Witness: Republic.

Q. The airplane?

A. F-84.

[fol. 171] Q. Will you describe your terminal facilities at Indianapolis?

A. We have a two-room office down there; possibly the rooms are fifteen by twenty. They have parking facilities in the lot for approximately fifteen units. There is a terminal manager and one office girl.

Q. And how much equipment do you have regularly stationed at Indianapolis?

A. Seventeen pieces of equipment.

Q. And what shippers do you serve in the Indianapolis area?

A. Ford Motor.

Q. With respect to aircraft parts?

A. Allison; this is all aircraft parts, Ford, Allison, General Electric, the Air Force at Dayton.

Q. And in addition to this equipment that is stationed at Indianapolis, how many units of equipment do you have floating in the general area of Indianapolis?

A. Can I check just a minute here?

Q. I think that is shown on one of the exhibits.

A. In the month of March of this year there was 153 units dispatched from the Indianapolis terminal. In the month of April there was 145.

Q. But, on any given average day how much equipment do you have operating in the Indianapolis area in addition to the ones that you mentioned were stationed at Indianapolis?

A. There are approximately six to eight units a day that [fol. 172] move through the Indianapolis terminal.

Q. Now, do you know the number of loads that you move daily in and out of Indianapolis?

A. T-7 represents Indianapolis; if you turn to the terminal list it will confirm it. I can break it down on a daily basis or I can give it to you on a monthly basis.

Q. Let's try it on the daily basis first.

A. Starting with March the 1st, on the 1st there were two loads out of there and six deadheads. On March the fourth there was one load and no deadheads.

Q. All right; let's switch to the monthly basis.

A. In the month of March there were sixty-one loads dispatched; ninety-two units moved away from there deadhead because there wasn't any freight for them.

Q. How about in April, '57?

A. April is over there (indicating). In the month of April there was sixty loads and eighty-five deadheads.

Q. By "sixty loads" you mean sixty units moved in?

A. Sixty units were dispatched away from there loaded; eighty-five dispatched away deadheaded. So far up until and including the 18th of May there has been thirty-two loaded and forty-two dispatched empty.

Q. Is deadheaded mileage a problem of your company, sir?

A. Right at present I would say approximately sixty-percent is deadheaded, is loaded compared to the deadheaded.

[fol. 173] Q. You also have an empty equipment problem in the Wichita area?

A. Yes, we do.

Q. And in connection with what service?

A. Pardon?

Q. In connection with what service, with what operation?

A. Well, it's an overall operation because there are more

units dispatched in there than there are loads coming back out.

Q. Is it primarily in connection with your operation to Tulsa, Oklahoma?

A. I would say approximately fifty percent of it is Tinker Field, Oklahoma.

Q. What is the status of your aircraft parts business at the present time? Is it improving or decreasing?

A. Aircraft and aircraft component parts at present probably makes us eighty-five percent or better of our overall operations.

Q. Is your business increasing or decreasing?

A. Right at the present it is slightly decreased.

Q. With respect to your equipment at Indianapolis or in the Indianapolis area, how much of this equipment is van-type equipment?

A. Well, there is nearly always one van at Indianapolis. We have little use for vans coming out of Indianapolis, but there is nearly always one there. When one van comes in we [fol. 174] dispatch the one that has been there.

Q. Is that a closed van?

A. Yes, it is.

Q. Is the terminal list marked as exhibit 13 more current than the terminal list shown on the last page of your advertising brochure?

A. The one on the back of the advertising brochure should be disregarded and supplement the new one for it.

Q. Have you recently transported traffic for Boeing other than between the points here concerned?

A. Yes, we have.

Q. And will you relate the circumstances?

A. We had a recent occasion where Boeing requested us to be granted an emergency authority to transport a delicate article to Seattle, Washington due to the fact that they had had previous damage on several shipments. They supported the application and the movement was accomplished.

Q. Looking at the picture of your van on the third page of your advertising brochure, how long would it take U.S.A.C. to install a removable fixed-top on this van?

A. Possibly ten days to two weeks, depending on what

length of time would be involved in making the fixtures that would be necessary.

Q. No, just the removable top.

A. Possibly three days.

[fol. 175] Q. If the instant traffic were tendered to you would you be willing to station a closed-top van trailer at Indianapolis?

A. We would.

Q. And if the shipper assisted U.S.A.C. in the same manner it has assisted J-T in the installation of fixtures, would you install the fixtures at your own expense?

A. We would.

Q. Does U.S.A.C. Transport have security clearance?

A. Yes, we do.

Q. How many underslung does U.S.A.C. have?

A. That I do not know offhand; approximately thirty-five.

Q. Did you hear Mr. Solomon testify respecting U.S.A.C.'s tariff rule as to the control of the vehicles?

A. Yes, I did, but I didn't clearly understand what he meant by it.

Q. In general what is the purpose of that rule?

A. Only to the extent that we do not like to have a shipper overload any particular unit, and therefore we deem the necessary equipment for a particular run to eliminate breakdowns and things in transit.

Q. And what is your understanding as to the reason why the shipper has not availed itself of U.S.A.C. Transport, despite your company's solicitations?

Mr. Wrape: I will object to that. How could the witness know why somebody else doesn't do something.

[fol. 176] Exam. Cunningham: Can you qualify the witness? The objection is sustained until the witness is qualified.

Q. In connection with your official duties, Mr. Decker, have you consulted, had some relation with the sales department in regard to their recent solicitation efforts at the Wichita plant of Boeing?

A. Only to the extent that we were willing to——

Q. Have you had any relation or official connection so that you can determine what the sales representative of

U.S.A.C. Transport received at Wichita as a result of his solicitation?

A. I understand they were very well received and that they were advised that there would be in the future component parts movement from the East, and at that time they were assured that we would supply anything that was required in the line of trailers or fixtures to meet their needs.

Q. But, did your sales representative inform your office as to the reason why U.S.A.C. was not used in the present move?

Mr. Wrape: I am going to object to that; that is pure hearsay from this witness.

Exam. Cunningham: The objection is sustained until he can show that it isn't hearsay.

Q. In connection with your past experience in the transportation of delicate aircraft parts, do you consider a landing gear bulkhead which is used in the nose of a B-52 to withstand the impact of landing to be of a delicate or fragile nature?

[fol. 177] A. I do not.

Mr. Sullivan: That's all I have. I would like to offer into evidence at this time exhibits 12 through 21.

Mr. Wrape: I have no objection to them.

Exam. Cunningham: Exhibits 12 through 21 will be received in evidence.

(Protestant's exhibits Nos. 12 through 21, Witness Decker, for identification, were received in evidence.)

Cross-examination.

By Mr. Wrape:

Q. Mr. Decker, what did you say your position was?

A. I am in charge of the fleet control and overall operations of all equipment.

Q. Are you familiar with your current tariffs?

A. Pretty much so.

Q. And is it part of your duties to understand the rules and to publish the tariffs?

A. At present, no.

Q. Well, do you agree that your supplement No. 1 in FICC No. 30, which was effective April 1, 1957 has a rule 40 which reads:

"The determination of equipment to be used to transport any shipment efficiently and safely shall rest exclusively with the carrier."

You agree that that is contained in there?

A. That's correct.

[fol. 178] Q. All right; now, take your exhibit 14, sir. When you were talking about the loaded and empty trailers dispatched from given terminals, are you able to tell us which of those are vans which could be used for the transportation of components?

A. Not from the records that are here I couldn't.

Q. In other words, that includes your engine carriers, your lowboy equipment?

A. Overall dispatch of units.

Q. Now, will you agree with me that your exhibit 14 indicates in all some twenty-eight vans of various types with open roofs and closed roofs?

A. Open and closed.

Q. And that it reflects some 189 engine carriers, flat beds, and other types of trailers?

A. Correct.

Q. And I assume that you keep your fleet of a type to handle your business?

A. That is right.

Q. Now, your exhibit 21 was the Farmingdale operation. That was the F-84?

A. Correct.

Q. The last shipment shown on there was August 24, 1955. That was the end of the F-84 program, was it not?

A. The end of that particular movement for us, yes, sir.

Q. Now, on your exhibit 20, that's the Marietta, Georgia [fol. 179] movement; that was a B-47, and the program for building B-47's has been completed, has it not, sir?

A. That's correct.

Q. Your last movement was in August of '56?

A. I wouldn't exactly say the last movement was in August, '56, but the last one I show was in August, '56, and it terminated shortly after that.

Q. Now, the same is true with respect to exhibit 19, which was a B-47 movement to Tulsa. That program has been completed?

A. That is correct.

Q. And you are no longer engaged in moving that particular component?

A. That is correct.

Q. Now, do I understand from exhibit 12 that your company claims it can transport aircraft components between all of the points in the United States west or east of the Mississippi River?

A. Beg pardon again?

Q. I say, do I understand from exhibit 12 that your company claims it can transport aircraft components between each and every point located in the United States east of the Mississippi River?

Mr. Sullivan: I will object to that insofar as our authority east of the Mississippi River is not involved in this application, and even if it is I think the authority is stated in [fol. 180] a different sub number than we are discussing.

Mr. Wrape: I said exhibit 12; I didn't say the sub number.

Mr. Sullivan: We specified it as involving the proposed authorization.

Mr. Wrape: Mr. Examiner, he has put in exhibit 12. I want to ask him about that. He complains about my asking him about operations east of the river, whereas every exhibit he has put in has related almost exclusively to operations east of the river.

Exam. Cunningham: Are you objecting?

Mr. Sullivan: Yes.

Exam. Cunningham: Objection overruled.

By Mr. Wrape:

Q. Can you answer my question, sir?

A. Will you repeat it, please?

Q. Yes. Is it true that under exhibit 12 your company claims the right to be able to transport aircraft components between each and every point east of the Mississippi River in the United States?

A. To the extent of what our operating authority grants

us. I certainly wouldn't attempt—if this will help clarify what is in your mind—I wouldn't attempt to operate intrastate on that authority.

Mr. Sullivan: I don't think the witness understand counsel.

Q. With your limitations as to movements in interstate commerce, would that be true?

[fol. 181] A. Yes.

Q. Do you likewise claim under this certificate to be able to transport these aircraft components in interstate commerce between each and every point in the United States east of the Mississippi River to each and every point in the United States west of the Mississippi River?

A. Yes, if I understand you right, yes.

Exam. Cunningham: Does the exhibit show that?

Mr. Wrape: Yes, the exhibit shows that.

Q. Now, Mr. Decker, this emergency movement that you handled for Boeing of Seattle, from what origin was that?

A. Namely the state or the shipper.

Q. The city?

A. Stratford, Connecticut, to Seattle Washington.

Q. Now, in your exhibit 18, which are the B-36 wings, what are they, wings, or what?

A. Flaps.

Q. The B-36 program has long since been closed, has it not?

A. That is true. That is merely to establish the fact that we have carried that type of an operation.

Q. Is it true that the shipping fixture in that instance was made of wood?

A. Partially, not completely.

Q. Do you mean there were some metal screws in it?

A. There was metal reinforcing. There were metal [fol. 182] cradles and saddles in the bottom. The top portion that you are looking at, that is true, that is wood.

Q. And when did you handle the B-36 components?

A. That ran from 1952 until late 1954 or '55.

Q. Not late in '55; early in '55?

A. Late '54 or early '55.

Q. In your exhibit 17 what are the inside dimensions of that trailer?

A. As I recall it, the inside dimensions on that—the outside dimensions were thirty-four feet ten inches, eight foot in width and eight foot six inches in overall length.

Q. Eight foot six inches in overall length?

A. Inside.

Q. Inside?

A. That is correct.

Q. In your equipment list you show 135 special engine carriers. What are they?

A. In the upper right-hand corner, the upper left-hand corner, are both engine carriers.

Q. And the lower left-hand corner is the same kind of a trailer, isn't it?

A. Yes, with different sets of fixtures altogether on it.

Q. Are these fixtures for the carrying of engines permanently attached to the trailer?

A. No, sir.

[fol. 183] Q. You take them off on each trip?

A. They can be removed at any time they want to change to another commodity.

Mr. Wrape: Thank you, that's all.

Exam. Cunningham: Any redirect? That's all, fine.

(Witness excused.)

Mr. Sullivan: May we go off the record for just a moment, sir?

Exam. Cunningham: Off the record.

(Discussion off the record.)

Exam. Cunningham: Back on the record. The witness Mr. Solomon has been recalled by protestant counsel Brooks, and he is making him his own witness for the purpose of asking him one question, and as everyone knows here he will be bound by what he says. Go ahead.

ERNEST T. SOLOMON, having been previously duly sworn, testified further as follows:

Direct examination.

By Mr. Brooks:

Q. Sir, do the articles being transported and to which you testified to here earlier carry the strain of the impact of the landing wheel of the B-52?

A. I am not——

Q. You can answer that yes or no, if you know.

Exam. Cunningham: If you don't know, just say you don't know.

[fol. 184] The Witness: I cannot say that——

Exam. Cunningham: He is not qualified as an engineer.

The Witness: I don't know whether the entire stress of the landing weight of the plane is involved on these parts. I do know this, that when they are transported as they are now without being incorporated into the body structure of the aircraft, that they are of a very critical nature dimensional-wise. If they are off a little bit they won't fit in the jigs where we make our major body section. Once those parts are in the body section I would assume from a layman's standpoint, not being an aircraft engineer, that they are in a position then to take much more strain than they would be while they are being transported without being incorporated into the major body section.

Q. All right, sir. Have you ever had any damage to the part itself; that is, the bulkhead, whether being transported by rail or by truck, to date?

A. To my knowledge we haven't had any damage on it.

Mr. Brooks: That's all.

Exam. Cunningham: That's all, thank you.

(Witness excused.)

Exam. Cunningham: Call the next witness.

Mr. Brooks: Mr. Robert Gambill.

ROBERT GAMBILL, was duly sworn and testified as follows:

[fol. 185] Direct examination.

By Mr. Brooks:

Q. State your name, please.
A. Robert Gambill.
Q. Where do you live, sir?
A. Kansas City, Missouri.
Q. With what company are you connected?
A. Belger Cartage Service, Inc., of Kansas City.
Q. And what type of business does that company engage in?
A. Heavy hauler, commonly known as heavy hauler of articles which because of their size or weight require special handling and special equipment.
Q. What is your position in the company?
A. Officially I am known as the operations manager.
Q. And how long have you been with the firm?
A. A total of about ten years.
Q. And had you had experience in that type of business prior to that time?
A. I have been in it for twenty-six consecutive years.
Q. Your company has authority from the Interstate Commerce Commission?
A. Yes, we do have.

Mr. Brooks: May we have this marked, sir?
Exam. Cunningham: It will be identified as exhibit 22.

(Document was marked protestant's exhibit 22, Witness Gambill, for identification.)

[fol. 186] Q. I hand you what has been marked as exhibit 22 and ask you if that is the authority issued to you by the Interstate Commerce Commission, to Belger Cartage Service, Inc.?
A. Yes, it is.
Q. Now, that authority in itself only covers Missouri and the State of Kansas?
A. That's correct.
Q. Can you tell me the interest of the Belger Cartage Service, Inc. in this application, sir?
A. Well, as our certificate sets out we are authorized to haul statewide in the State of Kansas from the State of

Missouri or from Kansas to Missouri, and we have entered into an arrangement with the Daniel Hamm Drayage Company of St. Louis, Missouri in an attempt to secure some of this plane part hauling from the Boeing Company of Wichita. We do not presently operate trailers of the type that have been brought out in this hearing. The Daniel Hamm Company does operate a number of that type of trailer.

Q. Now, there is a witness here from Hamm to testify concerning the equipment, is there not?

A. Yes, sir.

Q. You have seen the equipment, have you?

A. Many times.

Q. And the authority of the Hamm Company will come out later, but that includes the State of Indiana and Illinois and Missouri, is that correct?

[fol. 187] A. Yes, it does.

Q. Among other states?

A. Yes.

Mr. Brooks: May we have this marked, please, sir?

Exam. Cunningham: It will be identified as exhibit 23.

(Document was marked protestant's exhibit 23, Witness Gambill, for identification.)

Q. I hand you exhibit 23 and ask you if that is a list of equipment of Belger Cartage Service?

A. Yes, it is.

Q. And they are in operation at the present time in the area throughout Missouri and Kansas?

A. That's right.

Q. Are you members of the so-called Red Book or the Heavy and Specialized Carriers Joint Tariff No. 100B, F. H. Floyd, Agent, Washington, D. C.?

A. Yes, we are.

Q. Is Daniel Hamm Drayage Company to your knowledge also a member of that organization and a participant in the joint tariff?

A. Yes, they are.

Q. Do you know of other members of that joint tariff who have a signed contract with your company which would involve the territory covered between Indianapolis, Indiana and Wichita, Kansas?

[fol. 188] A. The R. L. Jeffries Company.

Q. R. L. Jeffries Trucking Company of Evansville, Indiana?

A. Yes, sir.

Q. Now, sir, do you operate an interchange service regularly under that Red Book plan?

A. Yes, we do.

Q. Very briefly tell us what the operation would be if a movement were made in interchange arrangements between you—that is, Belger—and the Hamm Company, between Indianapolis, Indiana and Wichita, Kansas?

A. Well, obviously, of course——

Exam. Cunningham: Can't he bring that out from the originating carrier?

Mr. Brooks: Yes, except, Mr. Examiner, this witness has done the solicitation at Wichita, which I am going into. They have an office in Wichita, and I wanted to bring it out from destination, and perhaps should have put the originating carrier on first; but, I think the results will be the same.

Exam. Cunningham: Go ahead, just so it isn't repetitious from both witnesses.

By Mr. Brooks:

Q. Will you explain the operation; tell us what you have in Wichita, what you have done to seek the business, and how the operation would work if you get the business?

[fol. 189] A. Well, we maintain a complete terminal and office facility at Wichita. We have available at Wichita service that we render at any point in the Kansas City area. It's a lesser quantity, but the service is complete as we have it in Kansas City. As I stated, we have no so-called airplane type trailers, but we have solicited that type of hauling from the Boeing Company with the understanding that we would have this interchange arrangement with the Daniel Hamm Company, whose equipment would be the equipment used, and it would be used on an interchange arrangement under this tariff 100B. The Hamm equipment, of course, would carry the load hauled away to Wichita.

Q. From origin point of Indianapolis?

A. From Indianapolis.

Q. Would the driver be the same?

A. No, we have not.

Mr. Wrape: Thank you, that's all.

Exam. Cunningham: Any redirect?

Mr. Brooks: No redirect; I would like to offer exhibits 22 and 23.

Mr. Wrape: I have no objections.

Exam. Cunningham: Exhibits 22 and 23 will be received.

(Protestant's exhibits 22 and 23, Witness Gambill, for identification, were received in evidence.)

(Witness excused.)

[fol. 193] (Discussion off the record.)

Exam. Cunningham: Back on the record.

---

ANDREW SARGENT, was duly sworn and testified as follows:

Direct Examination.

By Mr. Brooks:

Q. State your name, please.

A. Andrew Sargent.

Q. Where do you live?

A. 6200 Nagel Avenue, St. Louis, Missouri.

Q. With what company are you connected?

A. Daniel Hamm Drayage Company.

Q. What kind of business does Daniel Hamm Drayage Company do?

A. Heavy and specialized hauling and freight and appliance delivery. There are five or six different departments of Daniel Hamm Drayage.

Q. What is your association with the company?

A. I am the manager of the heavy specialized hauling department.

Q. And before your service with Hamm had you had experience with other heavy haulers prior to that?

A. Yes, I have, with Arthur Morgan, South Hampton Hauling Company, Wilford Heavy Hauling Company, twenty years of association with the heavy hauling business.

Mr. Brooks: May we have this marked, sir?
Exam. Cunningham: It will be identified as exhibit 24.

[fol. 194] (Document was marked protestant's exhibit 24, Witness Sargent, for identification.)

Q. I hand you what has been marked exhibit 24 and ask you if that is the authority issued by the Commission in MC 42963, Sub 2?
A. That is right.
Q. And for the matter concerned here authority is granted between the states of Missouri, Illinois and Indiana, is that correct?
A. That's correct.

Mr. Brooks: May we have this marked, sir?
Exam. Cunningham: It will be identified as exhibit 25.

(Document was marked protestant's exhibit 25, Witness Sargent, for identification.)

Q. I hand you what has been marked exhibit 25 and ask you to identify that briefly, please.
A. It is a true picture of the equipment owned by Daniel Hamm Drayage.
Q. As of June 1st, 1957?
A. That's right.
Q. Now, sir, you have heard the testimony here today?
A. Yes, I have.
Q. Tell us what pieces of equipment would be suitable in your opinion for the transportation of the commodities involved?
A. Well, here is a unit on the first page. Here is unit No. [fol. 195] 542 and 543.

Exam. Cunningham: What page is that on?
Mr. Brooks: Page one, I believe, Mr. Examiner, the last two items.

By Mr. Brooks:

Q. You are referring to the item marked "airplane trailers"?
A. That's right.
Q. The last two items on page one?
A. Yes. Page seven, unit 557, 558, unit 564; page eight,

A. That is correct; we have transported wings to California.

Q. Have there been any delays to your knowledge in that type of movement by interchange?

A. No delays whatsoever; interchange is prearranged and it is a through shipment.

Q. You already have your master contract signed?

A. Yes, sir.

Q. And the signs of the Belger Cartage Company and the Hamm Company are capable of being put on the Hamm equipment when you reach the point of interchange?

A. That is right.

Q. Inspection would be made at Kansas City, Missouri [fol. 199] at the office of Belger Cartage Service?

A. That is right.

Q. Is this type of business desirable to your company?

A. Yes, it is, due to having three trailers setting. We would sure like to put them to work; can't use them for anything else.

Mr. Brooks: I believe that's all.

Exam. Cunningham: Did you say it would interline with Belger at the Missouri line?

The Witness: Belger overlaps over our authority. We both have Missouri authority.

Exam. Cunningham: Where would you actually interline? Would it be at the state line or at a specific point.

The Witness: It would be a specific point.

Exam. Cunningham: Like where?

The Witness: It would be Independence, Missouri, it could be Kansas City, Missouri.

Exam. Cunningham: Cross examine.

Cross-examination.

By Mr. Wrape:

Q. Let's see, Mr. Witness. Which of the trailers are you using presently now in your airplane movement?

A. The ones that have wing trailers.

Q. The ones that say "wing trailers"?

A. Yes, sir.

Q. And those are all the ones except the two on page one, is that correct?

[fol. 200] A. Yes, sir, these two airplane trailers, they are being converted to wing trailers, and we can use them on a movement without getting special permits from the state.

Q. Aren't they over length or are you cutting the length off of them?

A. We have cab-over engine tractors; several of them are sleeper cabs. Our wing shipment is a through shipment; there is no stop.

Q. I understand that's the movement from—

A. *Bulkmore* to McDonald, and we can offer the same service to any other shipper.

Q. And you are using the trailers that you describe on exhibit 25 as wing trailers?

A. Yes, sir.

Q. On the McDonald movement?

A. That's right, sir.

Q. Now, these two that you are converting, they have canvas tops, do they not?

A. Yes, sir, they do.

Q. And they were the ones that you used to operate down into Texas?

A. Tulsa, Oklahoma.

Q. Tulsa, Oklahoma?

A. Yes.

Q. They are 1940?

[fol. 201] A. That's right.

Q. Now, have you discussed with anyone at Boeing whether or not this component can be safely handled with a gantry crane?

A. No, sir, I haven't; but, Boeing is aware of our services.

Q. Have you discussed with anyone at Boeing the handling of this particular component on a monorail or a sling arrangement?

A. Mr. Wrape, today is my first day of ever knowing that J-T was hauling this commodity.

Q. Now, as I understand it you have never interlined any aircraft component with Belger? Belger says he has never handled any.

A. No, everything has to go to Tulsa. We interline with

61.0

A. In all probability the same driver, the same truck all the way.

Q. How many times have you solicited the business from the Boeing Company, yourself personally?

A. I personally have been in there about five times. I haven't been down there for the past couple of years; we turned it over to our Wichita manager.

Q. Does his work head up under you as operation manager?

A. Yes, it does.

Q. Does he advise you that further solicitation has been [fol. 190] made in Wichita?

A. Well, he advised me that it has been made and he told me he didn't think there was much point in pursuing it any further.

Q. When you yourself solicited the business did you offer the Red Book service; that is, the service under the Red Book plan?

Exam. Cunningham: His business wasn't in existence when he solicited it, was it?

Mr. Brooks: A similar type of business, Mr. Examiner.

Exam. Cunningham: From Indianapolis to Wichita?

Mr. Brooks: It was between two other points.

Exam. Cunningham: That wouldn't make any difference here.

Q. Well, sir, did you explain to Mr.—is it Eldridge?

A. Mr. Eldridge was the gentleman with whom I talked.

Q. Was he the traffic manager at that time?

A. I believe he was; he was the gentleman I was directed to. The first time I was down there I think I waited three hours in the lobby, but I finally got in and I think I wound up with Mr. Eldridge. He was in the traffic department; of course, I didn't know whether he was the traffic manager or one of the assistants.

Q. Did you leave all the tariffs and the Red Book tariff and the rates and the service with him?

A. I gave him a copy of the tariff and explained it to him as best I could, how the particular thing operated, because [fol. 191] some of these fellows are not too familiar with these heavy haulers over irregular routes with special commodities.

Q. Have you ever received any of the business?

A. I don't to my knowledge know of a dollar's worth of business we have ever hauled over the road for the Boeing Company. We have done some local work at the Boeing plant.

Q. Do you have drivers with security clearance?

A. Yes, we do; I have it myself also.

Mr. Brooks: I believe that's all.

Exam. Cunningham: Cross examine.

Cross-examination.

By Mr. Wrape:

Q. The local work was in the nature of rigging?

A. Well, to clarify the thing, we have never done any work to my knowledge and billed it to the Boeing plant. We have done quite a bit of work in and around the Boeing plant, but always for a contractor who was in turn working for Boeing, and it could be in most cases construed as rigging, although we have done a good deal of local trucking work for the contractors working at Boeing.

Q. You mean you haul the contractor's machinery into the Boeing plant?

A. No, we have also moved heavy machinery tool equipment that was going to be installed in the Boeing plant; we have unloaded it from the cars.

Q. That's the usual type of business a heavy hauler en-

[fol. 192] gages in, is it not?

A. In the local line, yes.

Q. Now, when was it that you solicited Mr. Eldridge?

A. I haven't been in there myself for, oh, since early 1955, I am sure, because that's when our present manager took over down there. There were several men in the traffic department down there, and it is a huge place, of course, and it is next to impossible from my own experience to see the same man twice, and when you go in there you might as well go early in the day because it usually took me the greater part of the day to see one man; and, of course, I saw *however* was available that they would direct me to.

Q. I suppose they are busy. Now, Mr. Gambill, as I understand it, your company has not engaged in the transportation of any aircraft components?

unit 578, unit 586, unit 589. One of these so-called airplane trailers has been converted; they are ten foot. One has been converted to a wing trailer and has been cut down eight feet, and the other two are in the process of being cut down to eight feet, and they lay approximately eight to nine inches off the ground.

Q. Now, sir, in pointing to exhibit 16 submitted by the U.S.A.C. on page three where these pictures depict the equipment of U.S.A.C., does the center picture on the right, is that similar to the airplane trailer of the Daniel Hamm Drayage Company?

A. Very similar, only I believe the lower beam is higher off the ground on the Daniel Hamm trailer in appearance. Appearances may be deceiving, but from appearance it looks like it may be a foot or a little more, but the Hamm's trailer bottom beam is lower.

[fol. 196] Q. I see. Now, how would you transport a load from Indianapolis, Indiana to Wichita, Kansas if the business was offered?

A. How?

Q. Yes.

A. Well, we would interchange with Belger at the Kansas-Missouri line.

Q. You both have the State of Missouri?

A. We both have the State of Missouri; Belger has an overlapping authority.

Q. And would you convert a trailer to the specifications and requirements of the applicant or the shipper witnesses in this case?

A. Yes, we would without too much trouble.

Q. Is there any other way, sir, in your opinion in which this load might be loaded and unloaded other than by this elevator arrangement which was discussed earlier?

A. Offhand I would say there would be two different ways, by the use of a gantry or by the use of a monorail with a trolley and a chain block with slings.

Q. Sir, are any of these airplane trailers idle at the present time?

A. Yes, we have three of them idle.

Q. I see. Has one of your arrangements for two of these trailers now been completed?

A. Yes.

[fol. 197] Q. And they are sitting in your yard at the present time?

A. There is one more which will be this week back in the yard; two of them are completed and one should be completed by Friday.

Q. I see. Would you station that equipment at Indianapolis, Indiana at the office of the H. & B. American Machine Company?

A. Yes, we would.

Q. And would you set that off to the service of Boeing Aircraft if service of three or four loads a month were given your company in connection with Belger?

A. We absolutely would.

Q. Is this the type of business that your drivers have experience in handling?

A. Definitely; we have been doing this type of hauling for, I would say, the last seven, eight years. We have been hauling wings from Baltimore to the McDonald Aircraft Plant at St. Louis, Missouri.

Q. Are those numerous movements a week?

A. Yes, there are. There is three to four movements a week, and I understand that it will be thirty-three movements a month by the time that March rolls around.

Q. Have you also moved to the west to Tulsa, Oklahoma, out of St. Charles?

A. Yes, fuselages.

Q. Airplane fuselages?

A. Yes, sir.

[fol. 198] Q. Was that a steady movement several times a week?

A. That was for a period of about two years, I believe.

Q. That arrangement is now completed?

A. That's right; in fact these trailers I mentioned were for that movement, the ones that are being cut down.

Q. They are the ones that are idle?

A. Yes, sir.

Q. With all of the movement you have ever made of these airplane assemblies through the interchange under the Red Book plan both to Tulsa, Oklahoma for a matter of two years regularly each week, and now to Baltimore—

A. Yes.

Q. —out of McDonald Aircraft plant in St. Louis?

either American Storage & Transfer, or possibly Gulf Southwestern.

Q. Well now, didn't you recently file an application in which you sought a single line certificate because of the unsatisfactory service that was resulting from this Belger interline?

A. Not to my knowledge, Mr. Wrape.

Q. You don't know anything about that?

A. No, sir.

Q. The Commission denied the application?

A. I don't know anything about that.

Q. Mr. Hamm usually handles these I.C.C. matters, doesn't he?

A. That's right.

Q. Now, I am interested in this movement. I have heard of this Red Book, Blue Book, whatever it is. Let's take a [fol. 202] typical speculative movement from Indianapolis to Wichita, and we are using one of these 1940 converted trailers. Whose driver would be on it at Indianapolis?

A. The Daniel Hamm driver.

Q. Who would dispatch that unit?

A. Daniel Hamm Drayage.

Q. Who would pay the expenses of operation?

A. Daniel Hamm Drayage.

Q. And who would direct the backing up of the unit at Boeing when it finally got there?

A. I believe it would be up to Boeing to have someone out there.

Q. Would it still be your driver on it?

A. Definitely, yes, sir.

Q. Now, would there be any necessity for your driver to contact a member of Belger's en route and cause any delay by that contact?

A. That would be arranged whereby possibly it would be about the time of the driver's layover; in other words, that he would have his ten hours' driving time in and then the Belger Company would inspect the truck for operation under its authority.

Mr. Wrape: That's all.

Exam. Cunningham: Any redirect?

Redirect Examination.

By Mr. Brooks:

Q. Do your drivers have security clearance from the Air Force?

A. Yes, we have ten drivers on this wing hauling that have clearance, and we have seven drivers that have the [fol. 203] highest type of clearance that you can possibly get. It takes about three months to screen a man. They are involved in atomic energy.

Mr. Brooks: I see; that's all, and I would like to offer exhibits 24 and 25.

Mr. Wrape: No objection.

Exam. Cunningham: Exhibits 24 and 25 will be received in evidence.

(Protestant's exhibits 24 and 25, Witness Sargent, for identification, were received in evidence.)

Exam. Cunningham: That's all.

(Witness excused.)

Exam. Cunningham: Are you ready to proceed?

Mr. McHendrie: Mr. Walker.

---

David J. Walker, was duly sworn and testified as follows:

Direct Examination.

By Mr. McHendrie:

Q. What is your name and address?

A. My name is David J. Walker, 80 East Jackson Boulevard, Chicago, Illinois.

Q. Are you connected with the Atchison, Topeka, and Santa Fe Railway Company?

A. Yes, sir, I have been employed by the Atchison, Topeka & Santa Fe for the past twenty-five years, the last five of which were spent in the commerce bureau of [fol. 204] that company with headquarters at Chicago.

Q. What is your present title, Mr. Walker?

A. I am a commerce clerk in that company.

Q. Mr. Walker, do you know whether or not the Santa Fe Railroad participated in rail movement of this particular component part from the H. & B. plant at Indianapolis to Boeing Aircraft Company?

A. Yes, we did during 1956.

Q. Did you receive those shipments from another carrier or carriers?

A. Yes, sir.

Q. At what point?

A. Kansas City, from the Wabash.

Q. Have you prepared an exhibit portraying the readiness and ability of the Atchison, Topeka & Santa Fe Railway Company to handle this movement or participate in it?

A. Yes, sir.

Mr. McHendrie: May I have the exhibit numbered, please?

Exam. Cunningham: It will be identified as exhibit No. 26.

(Document was marked Protestant's exhibit 26, Witness Walker, for identification.)

Mr. McHendrie: Counsel indicated they would stipulate as to the admission of this exhibit.

Mr. Wrape: We will, sir.

Exam. Cunningham: Is this your only exhibit?

[fol. 205] Mr. McHendrie: This is our only exhibit.

Exam. Cunningham: Do you want to offer it at this time?

Mr. McHendrie: I offer it at this time and tender the witness for cross examination.

Exam. Cunningham: Do you agree to the stipulation that this exhibit 26 may be received in evidence?

Mr. Wrape: I do.

Exam. Cunningham: And purports to show what is therein?

Mr. Wrape: I do.

Exam. Cunningham: Exhibit 26 will be received.

(Protestant's exhibit 26, Witness Walker, for identification, was received in evidence.)

Exam. Cunningham: Cross examine.
Mr. Wrape: No cross examination.
Exam. Cunningham: That's all, thank you.

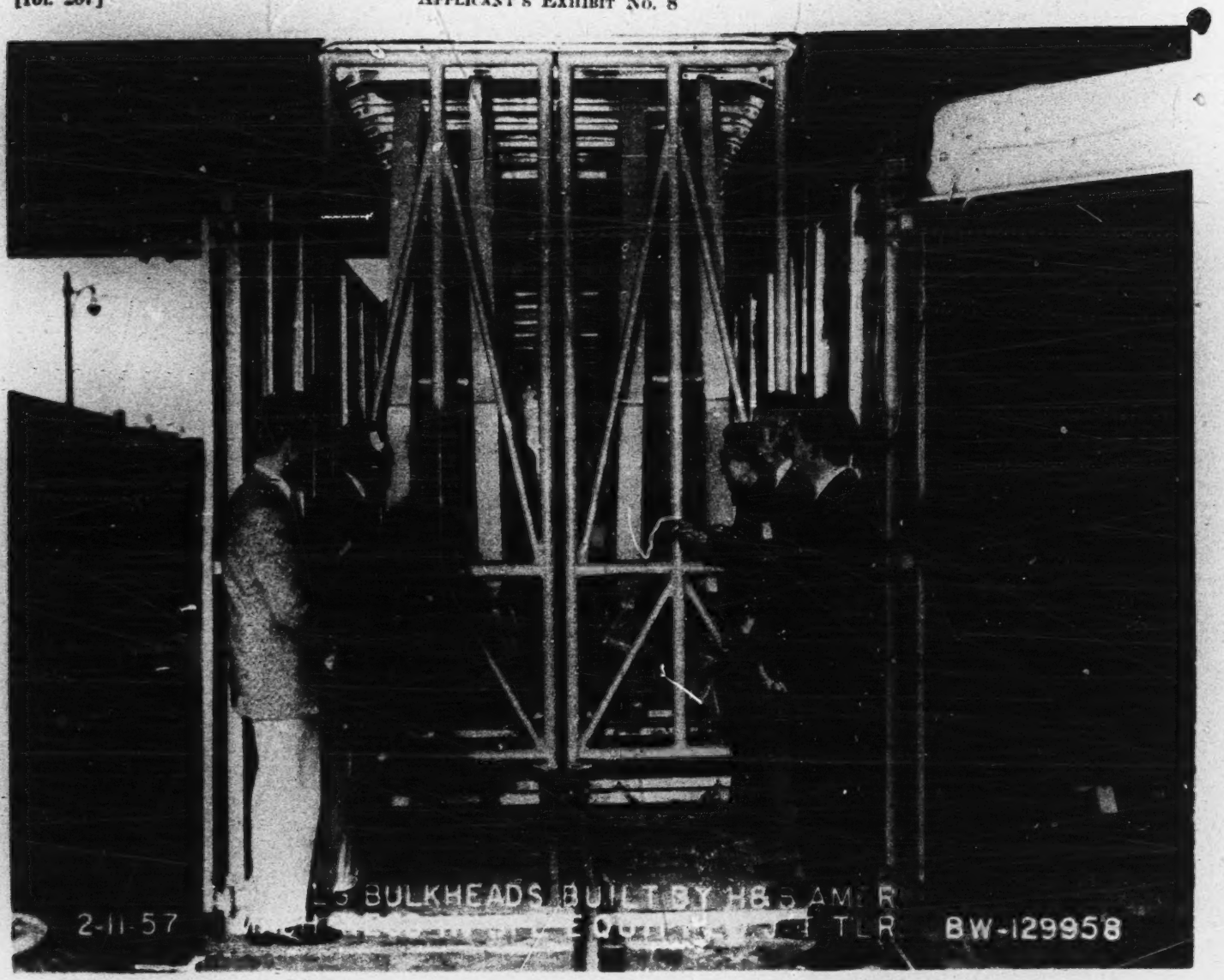
(Witness excused.)

Exam. Cunningham: Anything further in this proceeding? Do the parties desire to file briefs?
Mr. Wrape: I don't.
Exam. Cunningham: If there is nothing further the hearing in No. MC 11185, Sub. 102, is closed.

(At 2:50 p.m., May 23, 1957, hearing closed.)

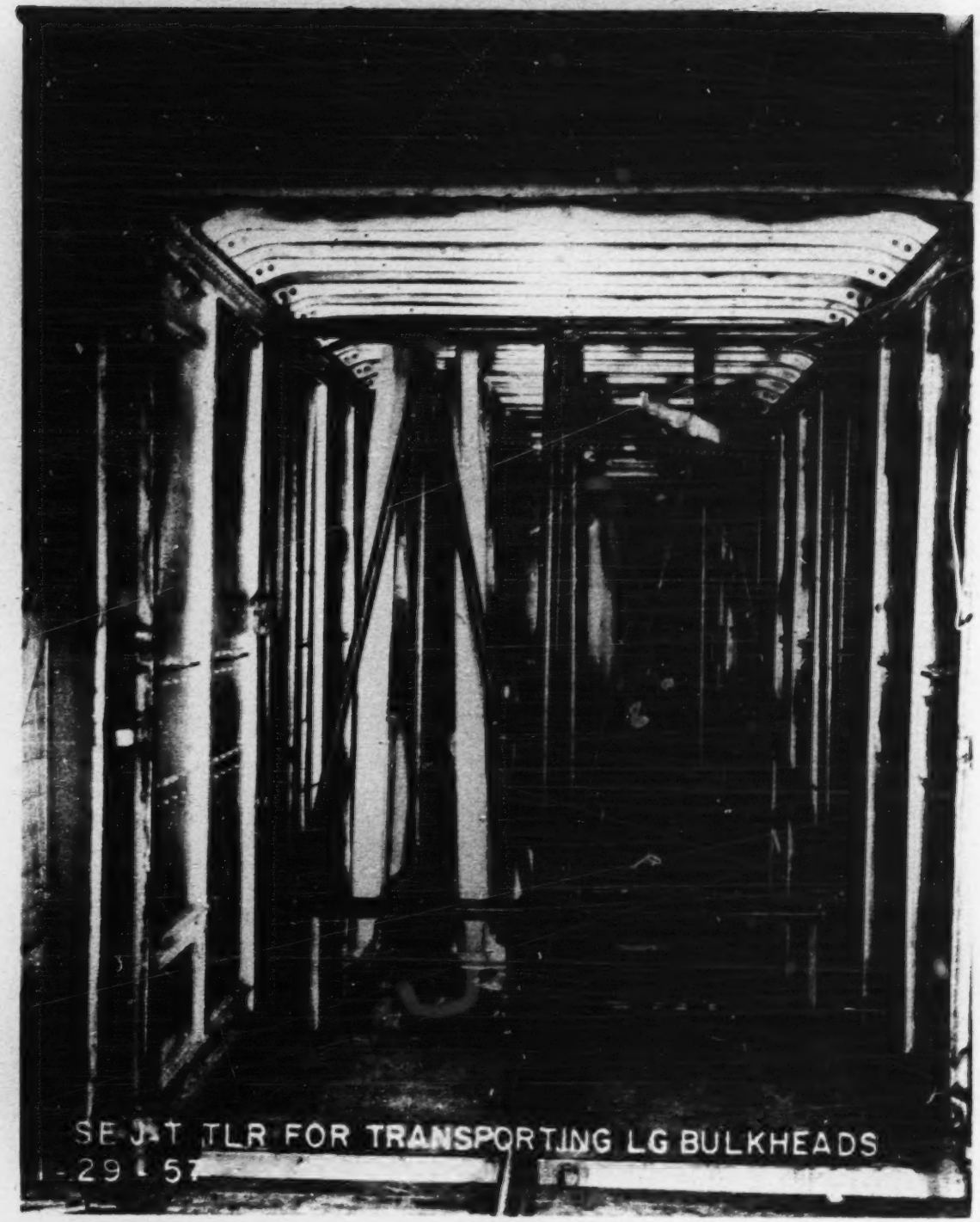
[fol. 213] PROTESTANTS' EXHIBIT No. 16

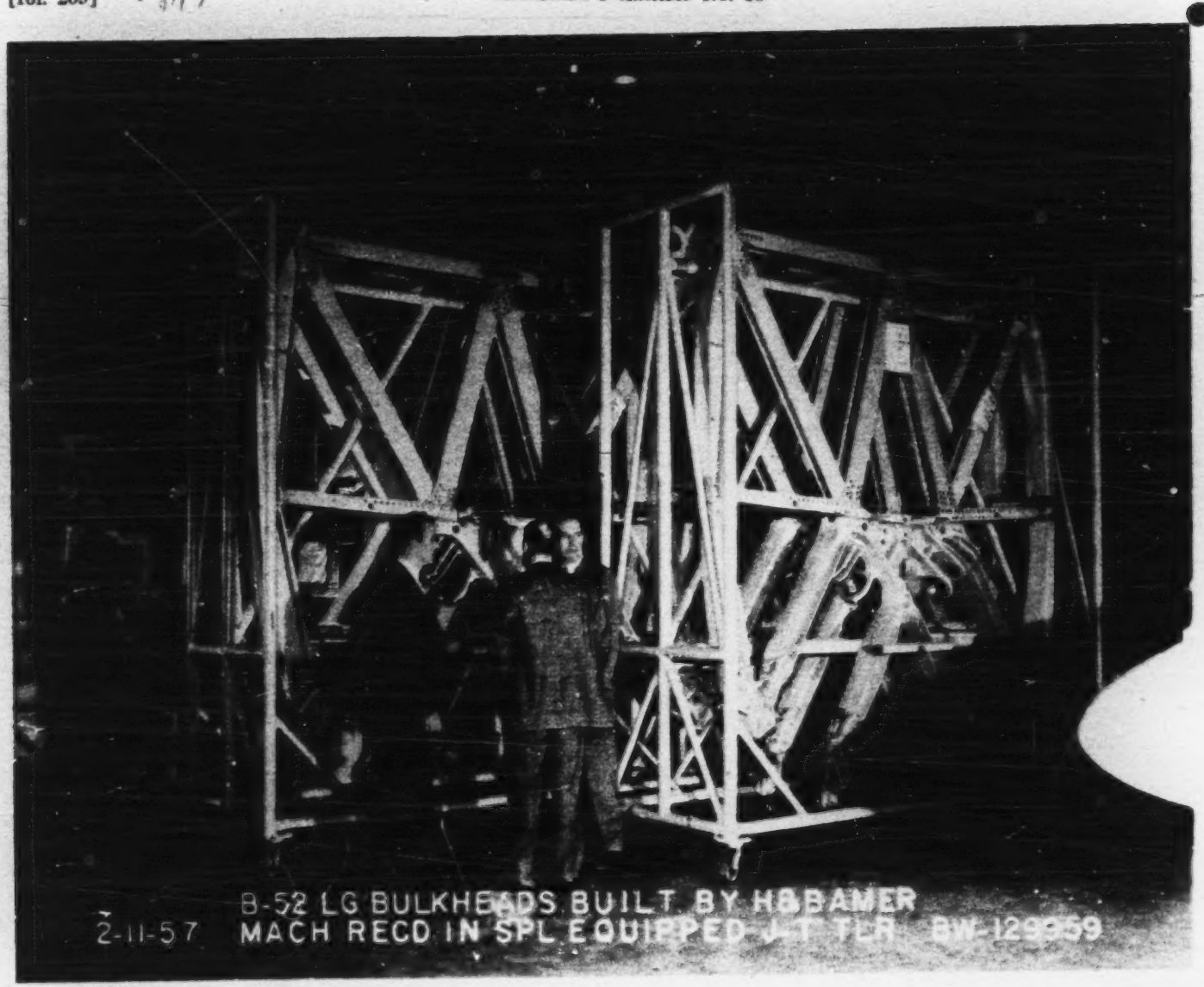
[fol. 207] APPLICANT'S EXHIBIT No. 8



[fol. 208]

APPLICANT'S EXHIBIT No. 9




B-52 LG BULKHEADS BUILT BY H&B AMER
2-11-57 MACH RECD IN SPL EQUIPPED J-T TER BW-129859

[fol. 210] 017

APPLICANT'S EXHIBIT No. 11

[fol. 211]

PROTESTANTS' EXHIBIT NO. 14

U.S.A.C. TRANSPORT INC.,
457 West Fort Street
Detroit 26, Michigan

MC-108068

## EQUIPMENT DISTRIBUTION BY TERMINALS

| TERMINAL | TRACTORS | TRAILERS |
|---|---|---|
| Dover, Delaware | 34 | 51 |
| Middletown, Pennsylvania | 35 | 27 |
| Warner Robins, Georgia | 3 | 5 |
| Hialeah, Florida | 18 | 14 |
| Mobile, Alabama | 53 | 55 |
| Indianapolis, Indiana | 17 | 15 |
| Dallas, Texas | 9 | 8 |
| Salt Lake City, Utah | 2 | 4 |
| Mishawaka, Indiana | 2 | 5 |
| Montebello, California | 12 | 19 |
| Unassigned (Float) | | 24 |

[fol. 212]

PROTESTANTS' EXHIBIT No. 15

147

U.S.A.C. TRANSPORT INC.,
457 West Fort Street
Detroit 26, Michigan
MC-108068

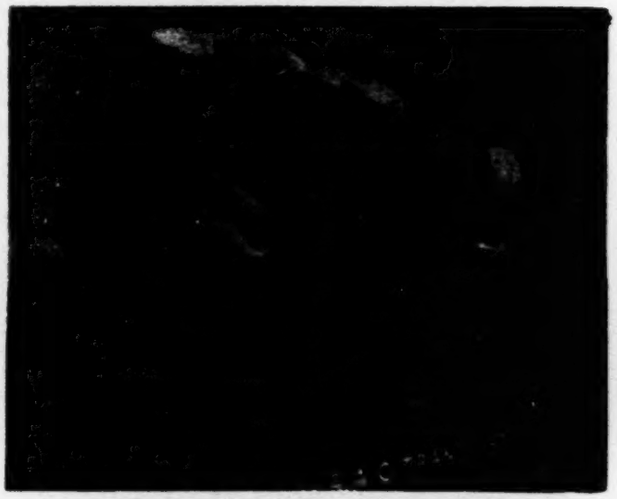
EQUIPMENT AVAILABLE MAY 15, 1957

| No. Units | Type | Type of Body | Length | Avg. Capacity |
|---|---|---|---|---|
| 142 | Tractors | Conventional | | |
| 43 | Tractors | Sleepers | | |
| 35 | Semi-Trailers | Single Axle Flat Bed | 32 Ft. | 24,000 |
| 10 | Semi-Trailers | Tandem Axle Flat Bed | 34 Ft. | 32,000 |
| 6 | Semi Trailers | Missile Carrier Flat Bed | 43 Ft. | 24,000 |
| 5 | Semi-Trailers | Open Top Vans | 32 Ft. | 24,000 |
| 2 | Semi-Trailers | Removable Roof Vans | 32 Ft. | 24,000 |
| 2 | Semi-Trailers | Tandem Axle Vans | 34 Ft. | 32,000 |
| 16 | Semi-Trailers | Closed Vans | 32 Ft. | 24,000 |
| 2 | Semi-Trailers | Special Open Top Vans | 60 Ft. | 24,000 |
| 135 | Semi-Trailers | Special Engine Carriers | 34 Ft. | 24,000 |
| 11 | Semi-Trailers | Heavy Duty Low Boys-T/Axle | 35 Ft. | 40,000 |
| 2 | Semi-Trailers | Special Low Bed Machine Type | 35 Ft. | 23,000 |
| 1 | Semi-Trailer | Single Axle S/W Special Aircraft | 34 Ft. | 12,000 |

[fol. 219]

Moving a fuselage.

Heavy duty low-boy trailer — 30 ton capacity.



Wing sections cradled on a low-boy.

[fol. 220]

# U.S.A.C. TRANSPORT, INC.

~~Administrative Office~~
~~3703 Bonita St., S.E.~~ USAC TRANSPORT, INC.
~~WASHINGTON 23, D. C.~~ 457 W. Fort Street
~~Jordan 8-7455~~ Detroit 26, Michigan

J. P. KAVOORAS
Pres. & Treas.

A. P. JACOBSON
Vice-Pres.

W. J. NORBET
Secy.

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97266 95811

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CHarleston 4-9453

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FOrest 7-4144

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**East Point**
**(Atlanta)**
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POplar 7-0577

**NEW MEXICO**
**Tucumcari**
Junction 66 & 54
355 J

**OHIO**
**Cincinnati**
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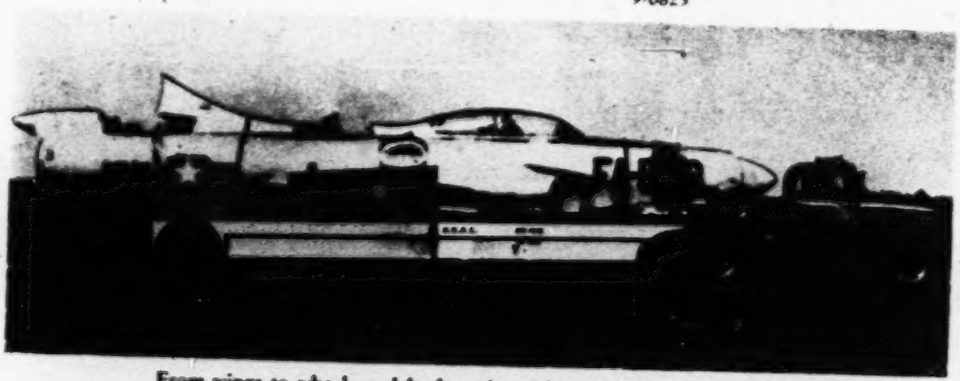
VAlley 1-6544

**OHIO**
**Springfield**
2730 Columbus Ave.
FAirfax 3-4606

**OREGON**
**Portland**
5585 N. Lagune St.
BUtler 9-1175

**UTAH**
**Salt Lake City**
1733 Beck St.
9-0823



**From wings to wheels and back again, with little labor or lost time.**

[fol. 214]

**WHAT HAS HAPPENED**

Our ability to serve the Aircraft, Heavy Equipment Industry, and the Department of National Defense, has increased tremendously during the past year. In offering our services in the Forty-eight States and Alaska, our fleet of tractors and specialized trailers has been greatly augmented and scores of trained, experienced drivers have been added to our staff.

Under new management since October 1955, U.S.A.C. Transport, Inc., is directed by men who are dedicated to the principle of giving unequalled service, and to the designing and development of equipment specifically suited for this type of specialized cargo.

**WE CAN SERVE YOU WELL**

To serve you promptly and conveniently, U.S.A.C. Transport, Inc., has established terminals at various locations throughout the country. To effectively serve the Aircraft, Heavy Equipment Industries, and the Dept. of National Defense, we are prepared to add more facilities as needed.

The nation-wide service which we offer, expedites the safe and efficient handling of critical defense materiel, and assures the steady flow of aircraft, aircraft engines, other aircraft component parts, and heavy machinery, between United States Army, Air Force, Navy and Marine Corps installations and Ports of Embarkation.

It is our mission to reduce the time span in transportation between the various segments of the industries we serve. Knowing the value of prompt service, we have provided the facilities, equipment and qualified personnel to transport complete aircraft, fuselages, wings, control surfaces, aircraft instruments and equipment as well as heavy machinery, on short notice—promptly and with special care, to insure satisfaction.

**WHAT WE CAN DO!**

We take pride in our ability and knowledge of the special preparations required to transport over-dimensional, over-weight, expensive and sometimes delicate cargoes.

May we have the privilege of handling your next shipment?

[fol. 215]

# Scope of Operating Authority

Operating in interstate or foreign commerce to the extent of the operating rights set forth below, enabling us to give direct service, eliminating exchange of equipment and driver personnel.
OVER IRREGULAR ROUTES:

## *I.C.C. Certificate MC-108068:*

*Grounded and disabled airplanes and uncrated airplane parts,*
Between points and places in that part of the United States east of a line beginning at the mouth of the Mississippi River and extending along that river to its source near Grand Rapids, Minn., thence along a line extending in a northerly direction to the boundary of the United States and Canada at Pelland, Minn.

RESTRICTION: Traffic in grounded and disabled airplanes is restricted to movements from the points at which such planes are located, and that in uncrated airplane parts is restricted to movements to such points.

*Airplanes and airplane parts,*
Between Nashville, Tenn., and Hagerstown, Md.
*Such commodities* as contractors' equipment, heavy and bulky articles, machinery and machine parts, and articles requiring specialized handling or rigging,

Between points and places in North Carolina, Virginia, West Virginia, Delaware, Maryland, New Jersey, Pennsylvania, New York, Connecticut, Rhode Island, Massachusetts, Ohio, Illinois, Indiana, and the District of Columbia.

## *Certificate MC-108068 Sub 12:*

*Aircraft,* fully assembled or partially dismantled, and *component parts,* of any partially dismantled unit of aircraft moving in connection therewith, *aircraft parts,* crated or uncrated, restricted to parts requiring special equipment or handling by reason of size, weight, or fragile character, and *special facilities and empty containers* used by said carrier in the transportation of the transportation of the above described aircraft and aircraft parts, over irregular routes,

Between points and places in that part of hte United States east of a line beginning at the mouth of the Mississippi River and extending along that river to its source near Grand Rapids, Minn., thence along a line extending in a northerly direction to the boundary of the United States and Canada at Pelland, Minn.
Between the points and places described above, on the one hand, and on the other, points and places in that part of the United States west of the above-described line.

## *Certificate MC-108068 Sub 20:*

*Aircraft,* assembled or dismantled, and *component parts* of any partially dismantled unit of aircraft moving in connection therewith, *aircraft parts,* crated or uncrated, restricted to parts requiring special equipment or handling by reason of size, weight, or fragile character, for aircraft or component parts thereof which have had a prior movement, and *special facilities and empty containers* used by said carrier in the transportation of the above described aircraft and aircraft parts, over irregular routes,

Between points in Robertson Township, St. Louis County, Mo. on the one hand, and, on the other, Muroc Air Force Base, Calif., traversing Arizona, Arkansas, Colorado, Iowa, Idaho, Kansas, Nebraska, Nevada, New Mexico, Oklahoma, Oregon, Utah, and Wyoming for operating convenience only.

## *Certificate MC-108068 Sub 23:*

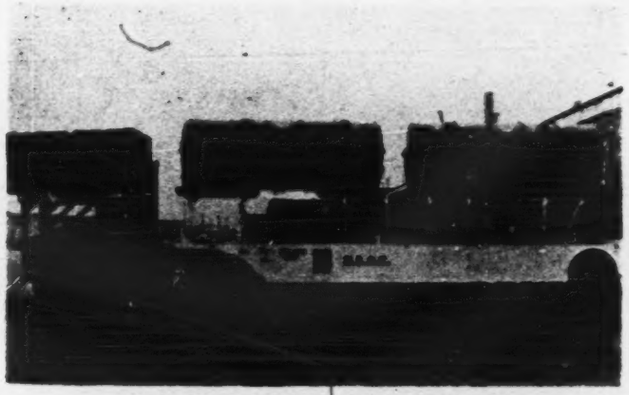
*General commodities,* except new passenger automobiles, commodities moving in tank vehicles and dangerous explosives,

Between all points in the United States on the one hand, and Ports of Entry on the Pacific Coast and those on the United States-Canadian boundary line, on the other, over irregular routes, restricted to traffic moving to he territory of Alaska on Unied States government bills of lading.

NOTE: Shipments are to be loaded and secured on carrier's equipment by consignor and are to be unloaded from such equipment by consignee.

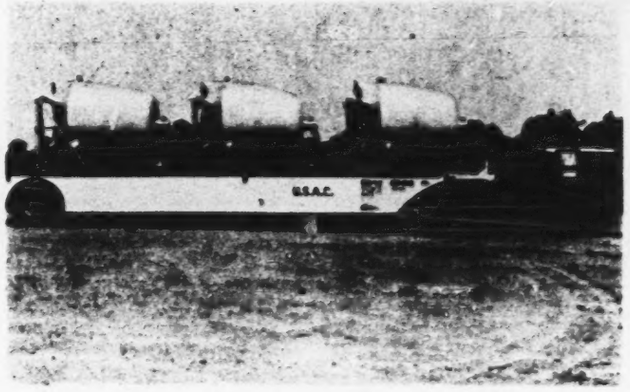
[fol. 216]

## *Unusual cargoes are the usual thing for U.S.A.C. as shown in the following photographs.*



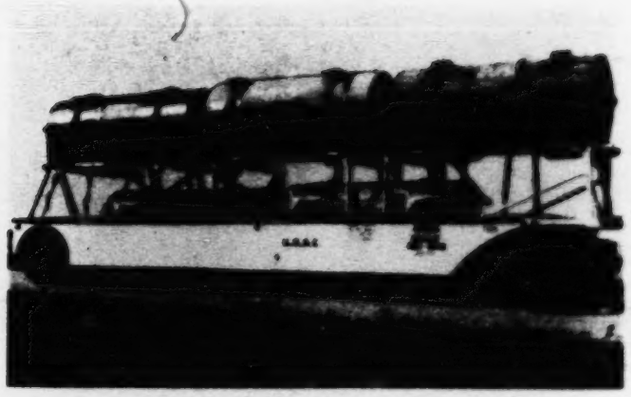
A load from Aircraft Engine Division, Ford Motor Co. — 3 cans 16 feet long with 2 after burners.

Trailer used for uncrated aircraft parts, transported on built-in fixtures.



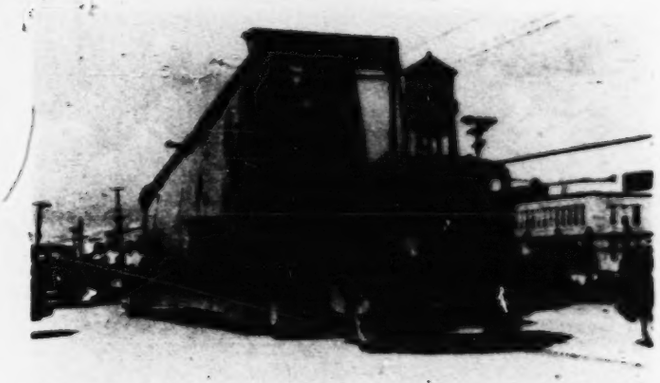

Three Power-Pax on convertible flat.

[fol. 217]



Five cans—engines.

Fuselage and wings on tandem low-boy—custom built.

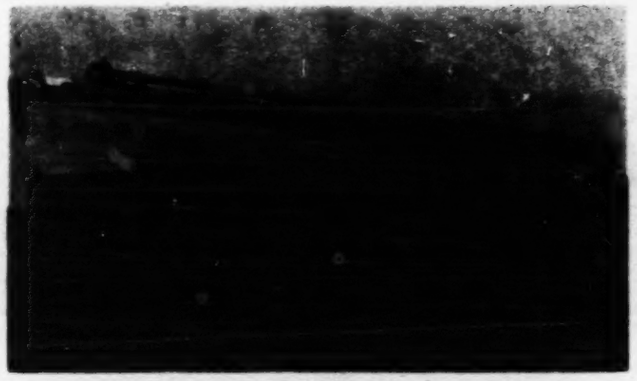


Wing panels cradled on custom low-boy.

[fol. 218]

Cradled fuselage on high-boy flat.

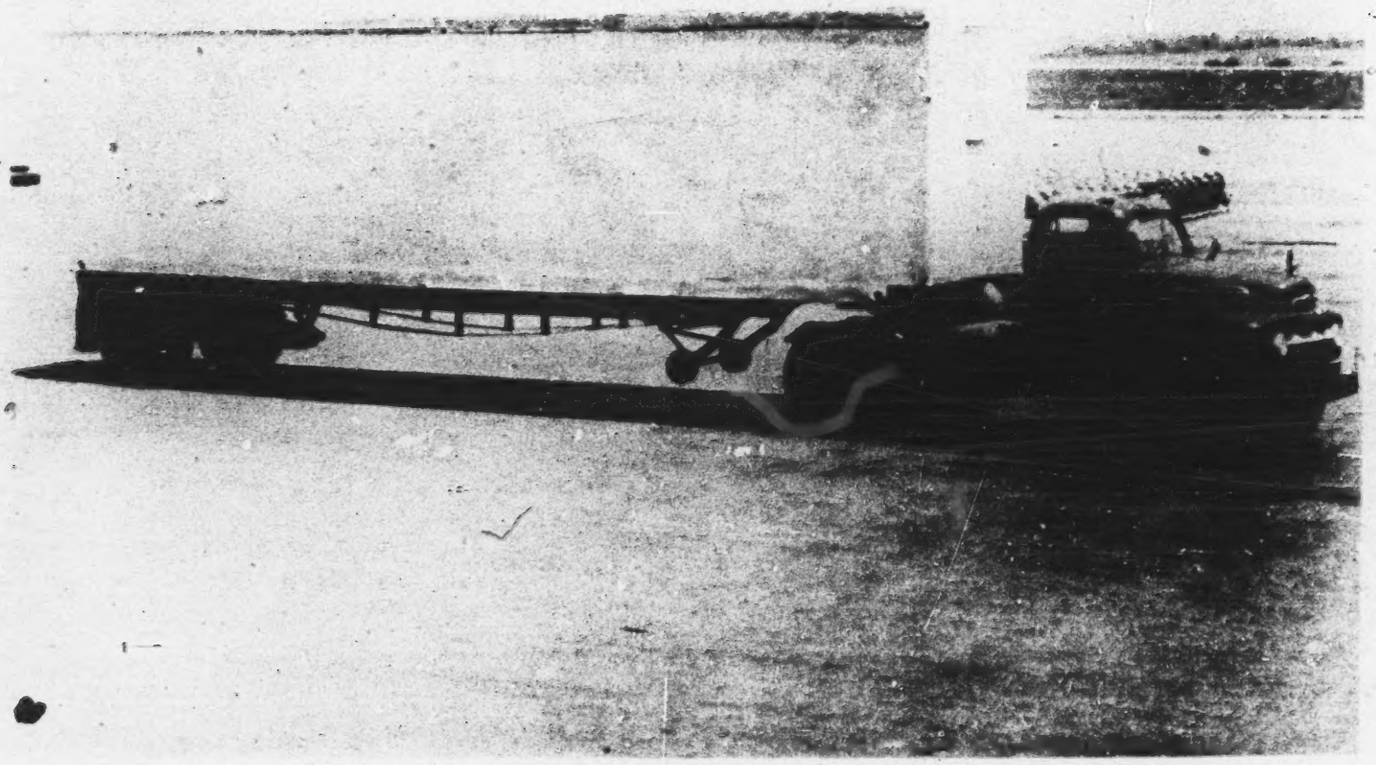
A large cabin cruiser on heavy low-boy.



Television antenna.

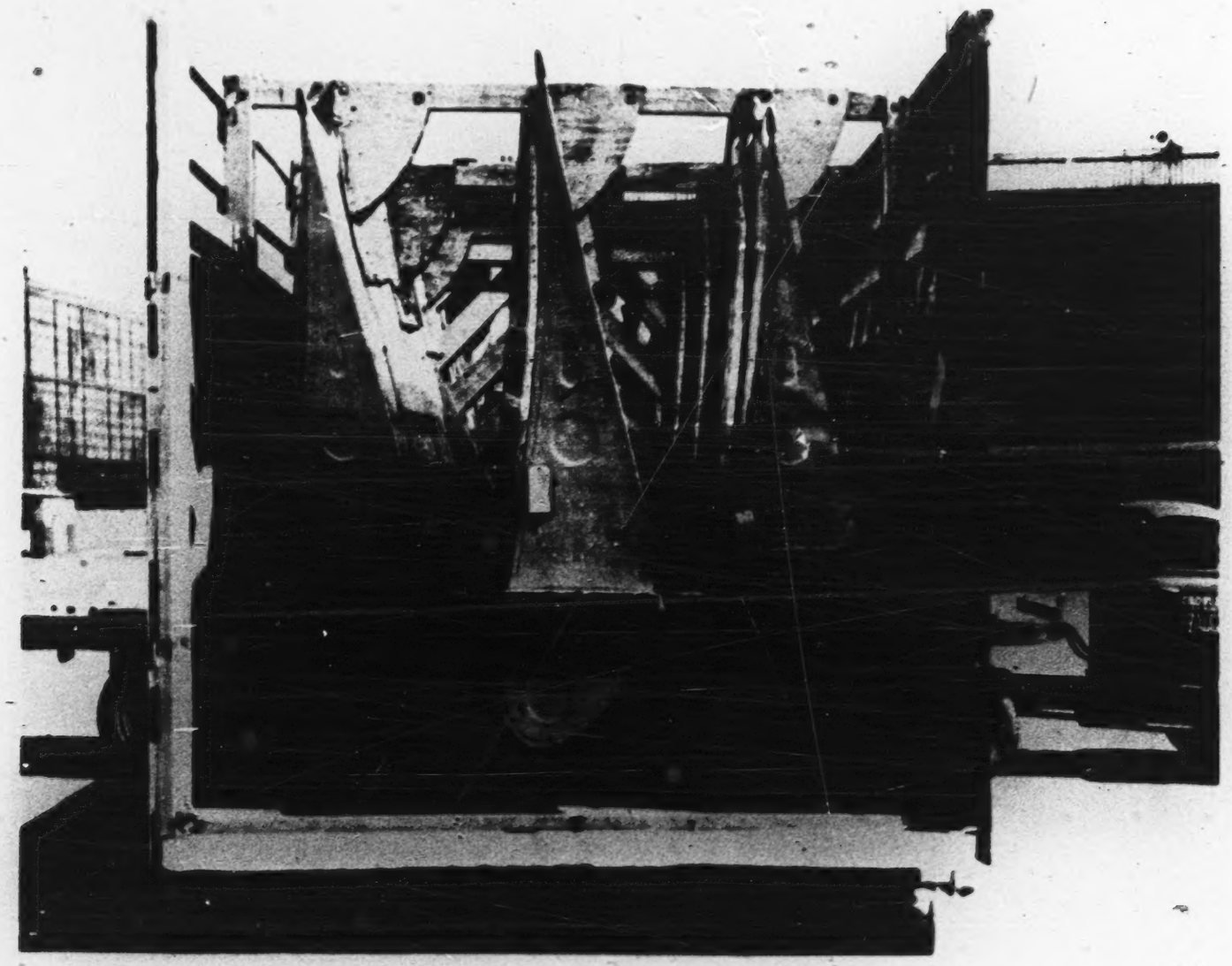
[fol. 221] 10

PROTESTANTS' EXHIBIT No. 17



[fol. 222]

PROTESTANTS' EXHIBIT No. 18



157

[fol. 223] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

J-T TRANSPORT COMPANY, INC., Plaintiff,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Defendants.

JUDGMENT—August 9, 1960

Before Johnsen and Matthes, Circuit Judges, and Smith, District Judge.

This opinion prepared by Judge Smith and this day filed is hereby approved and adopted as the opinion of the Court, and pursuant thereto.

It is hereby ordered, adjudged and decreed that the orders of the Interstate Commerce Commission involved here be and are set aside as being unlawful and void, and the case is remanded to the Commission for further proceedings consistent with the views and rulings expressed in said opinion.

Harvey M. Johnsen, Circuit Judge. M. C. Matthes, Circuit Judge. R. Jasper Smith, District Judge.

[fol. 224] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

J-T TRANSPORT COMPANY, INC., Plaintiff,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Defendants.

OPINION—August 9, 1960

Before Johnsen and Matthes, Circuit Judges, and Smith, District Judge.

Smith, District Judge.

This is an action brought under Sections 1336, 1398, 2284, and 2321 to 2325, inclusive, of Title 28, United States Code, to enjoin, set aside and annul orders of the Interstate Commerce Commission dated January 31, 1958, and June 15, 1959, and to compel action by the Interstate Commerce Commission unlawfully withheld upon the application of plaintiff in a proceeding under Section 209(b) of the Interstate Commerce Act (49 U.S.C.A., 309(b)), to grant to plaintiff a permit as a contract carrier of certain property by motor vehicle from Indianapolis, Indiana, to Wichita, Kansas. By leave of Court Contract Carrier Conference of American Trucking Association, Inc. and Aerospace Industries Association of America, Inc., as Intervening Plaintiffs, and U.S.A.C. Transport, Inc., Regular Common Carrier Conference of American Trucking Association, Inc,, and Common Carrier Conference—Irregular Route—of American Trucking Association, Inc., as Intervening Defendants, were allowed to intervene and file briefs.

Since 1953, plaintiff has held certain irregular route permits from the Commission as a contract carrier of property [fol. 225] by motor vehicle. On March 14, 1957, it filed its application for an additional irregular route permit to authorize an extension of its operations in transporting aircraft assemblies, uncrated, requiring special handling and special equipment because of their fragile nature, from Indianapolis to Wichita. The application is supported by

Boeing Aircraft Company, which operates a plant at Wichita for the production of airplanes.

The specific commodities to be transported are "landing gear bulkheads". They are purchased by Boeing from a manufacturer at Indianapolis, for installation at Boeing's assembly plant in Wichita. Each bulkhead weighs about 1380 pounds, it has a value of about $24,000.00, and extreme care must be exercised in its transportation. Because of the nature of the commodity, crating as required for rail transportation is impracticable. Each bulkhead is manufactured for use in a particular airplane, and ordinarily, a bulkhead can be used only in the plan for which it is manufactured.

Operating under its temporary authority, plaintiff has designed a specially constructed trailer, 35 feet long, 12½ feet high, and 8 feet wide. It utilizes this equipment in transporting the commodities for Boeing. It is possible to haul four bulkheads in one load, without special crating. Plaintiff's Wichita Terminal is located near the Boeing Plant, special equipment is assigned to the exclusive use of Boeing, and Boeing directs the movement of plaintiff's equipment which is available upon one hour's notice. The incoming bulkhead shipments are scheduled into Boeing's production line, for use on particular airplanes. Hence it is highly important that the bulkheads reach Boeing at a previously determined proper time to prevent disruption of production schedules. The bulkheads are unloaded directly into Boeing's production line. They are rigidly inspected by Boeing and the United States Air Force, and if there is material damage, they are returned to the [fol. 226] Indianapolis plant. Security safeguards must be taken, and plaintiff's drivers all have "security clearance."

Rail service was used at one time, but the cost of crating, loading and unloading was prohibitive. Furthermore, because of Boeing's need to correlate these incoming shipments with its production schedule, rail service was not feasible.

U.S.A.C. Transport, Inc., as a motor common carrier, holds authority to operate, over irregular routes, in the transportation of aircraft parts, crated or uncrated, restricted to parts requiring special equipment or handling

by reason of size, weight or fragile character, between the points involved in this application. It has never performed this transportation service for Boeing. It has indicated, however, that it, too, will design and construct any special equipment needed for hauling this commodity, and that it, in all other ways, stands ready and willing to serve Boeing's needs. It has no terminal or other facilities at Wichita, Kansas, although it does have terminal facilities at Indianapolis.

Boeing has urged that only very specialized contract carriage can reasonably satisfy its transportation requirements. Although it has not sought to utilize U.S.A.C.'s service in this particular operation, it had experienced unsatisfactory service by U.S.A.C. on a prior occasion in 1953.

Initial hearing on plaintiff's application was completed in May, 1957. On July 18, 1957, the Examiner filed his report recommending that the application be granted, and that the permit for contract carrier operation be issued. After reviewing the evidence described above, the Examiner, upon finding that "a need has been shown for the proposed operation and * * * * a grant of such authority will not adversely affect present transportation facilities to any material extent * * * *," concluded that a grant of authority would be consistent with the public interest and the national transportation policy.

[fol. 227] On January 31, 1958, after exceptions were filed to the Examiner's recommendation, Division One of the Commission, Commissioners Hutchinson and McPherson participating, adopted the Examiner's findings as to facts, but ruled that inasmuch as plaintiff had failed to establish that the proposed operation would be consistent with the public interest and the national transportation policy, the application would be denied. No mention whatever was made concerning tests prescribed by Sections 203(a)(15) and 209(b) of the Interstate Commerce Act, as amended August 22, 1957. The basis for the finding was expressed as follows:

> "The existing services of the opposing carriers which appeared to be in a position to handle the described traffic and are willing to modify equipment if necessary, have not been tried, much less shown to

be inadequate * * * * The burden is upon an applicant seeking contract carrier authority, as well as one seeking common carrier authority, to establish, among other things, that *there is a need for the services proposed which existing carriers cannot or will not meet.*" (Emphasis supplied)

On July 25, 1958, the entire Commission denied petitions for reconsideration and oral argument. Subsequently, however, on October 16, 1958, the Commission reopened the proceeding for consideration, and the matter was held under advisement until June 15, 1959, when the decision of January 31, 1958, was reaffirmed.

In its second report, the Commission, in discussing the 1957 amendments to Sections 203(a)(15) and 209(b), observed that "the decisive factor" in ruling upon applications for contract carriage permits has always been whether "the available common carrier service was reasonably adequate" to "meet the reasonable transportation needs of those supporting the application", and that the 1957 amendments did not change this test. The Commission further concluded that, in determining the adverse effect upon protesting carriers, there is a presumption that an adverse effect will follow from a loss of *potential traffic*, even if it may not have been handled before. In further [fol. 228] observing that Congress did not intend the tests of Section 209(b) to be exclusive, the Commission concluded that since the good of the national transportation policy as a whole must be considered, common carriers should be given the opportunity "to make an effective showing of their *willingness and ability* to provide needed service."

In applying the "new test", the Commission conceded that plaintiff met the definition of a contract carrier, and that, as to the number of contracts to be served, plaintiff is a "bonafide" contract carrier. It also conceded that the type of service proposed was properly that of a contract carrier (although common carriers might perform the same type of service); it found that U.S.A.C. would be adversely affected by the grant; and it found that plaintiff would suffer no material adverse effects because its special equipment could be converted to other uses. As to the adverse effect upon Boeing, the Commission felt that this depended upon a

determination of whether "existing service is adequate to meet their transportation requirements", and concluded that "(U.S.A.C.'s) ability and willingness to provide the service which (Boeing) require(s), and the fact that, with respect to the instant traffic (Boeing) has (not) attempted to avail itself of U.S.A.C.'s services, (prohibited a finding) that existing service has been shown to be inadequate." Commissioners Freas and Walrath concurred in the result. Commissioner Webb, in concurring, felt that the report prescribed a sixth test not authorized by Congress, and, in fact, specifically deleted by Congress, i.e., requiring the applicant to show that the protesting common carriers "are unwilling or unable" to meet the shipper's transportation requirements. Commissioner McPherson, who participated in the first report, dissented, concluding that Boeing required a specialized service which was within the definition of contract carriage, and upon weighing the effect of a grant or denial he would decide in favor of a grant of authority in this case. Commissioners Mitchell, Arpaia, [fol. 229] and Winchell did not participate. Thus it appears that the report of June 15, 1959, represents the expressed views of four of the eleven Commissioners.

On August 22, 1957, significant changes were made in the Interstate Commerce Act in reference to contract carriers by motor vehicle. Our research indicates that this case is one of first impression in construing the provisions of the Act as amended. In testing the validity of the Commission's action here we are required to make analysis of the present statutory base under which the Commission acted. It therefore becomes necessary briefly to summarize the events giving rise to the 1957 amendments to the Act.

Before the amendment, Section 203(15) of the Act, 49 U.S.C.A., Section 303(15), defined "contract carrier" in the following terms:

> "The term 'contract carrier by motor vehicle' means any person which, under individual contracts or agreements, engages in the transportation * * * * by motor vehicle of passengers or property in interstate or foreign commerce for compensation."

Under old Section 209(b), 49 U.S.C.A., Section 309(b), in ruling upon applications for contract carriage permits,

and apart from applicant's burden of showing that it was qualified generally as a contract carrier, the Commission was guided only by the requirement that the proposed service be "consistent with the public interest and the national transportation policy." In contrast, a *common carrier* was required to establish that its proposed operation was required "by the present or future public convenience and necessity." 49 U.S.C.A., Section 307(a).

In attempting to adjust the rights of contract and common carriers, the Commission found it necessary to expand and re-expand its interpretation of the Act. As a practical result, any difference in the standards and burden of proof on both types of applications became blurred, and sometimes interchangeable. Thus, in *William Heim Cartage Co., Inc., Ext.—Indianapolis*, 20 M.C.C. 329, 331, a *contract car-*
[fol. 230] *rier* application, the Commission spoke in terms of applicant's burden of showing "that facilities of existing carriers * * * * are inadequate, or that they are not rendering a type or character of service which satisfies the public need and convenience, and that the proposed service would tend to correct or substantially improve that condition."

In addition, the Commission began to read into Section 203(15) a "specialization test" as a prerequisite to a finding of bonafide contract carriage. However, common carriers began to amend their tariffs so as to offer "specialized service" with the ultimate result that contract carriers frequently were denied their claims of specialization. In attempting to resolve the perplexities of applying the "specialization test," the Commission turned to a consideration of the *number* of shippers served by contracts, as a factor negating specialization.

Generally, common carriers complained that contract carriers, by adding more and more contracts to their service, in effect became common carriers, to the detriment of that section of the industry. Conversely, the contract carriers found that as common carriers likewise began to offer specialized services, aided by the Commission's specialization test and attitude toward the standards and burden of proof on contract carrier applications, it became increasingly difficult to secure contract carriage permits.

Although some prior steps had been taken by the Com-

mission to secure legislation to "empower the Commission to limit the person or persons and the number or class of persons for which a contract carrier * * * * may lawfully perform transportation services," and "to provide that motor contract carrier permits may be issued *only upon a showing that existing common carriers are unwilling or unable* to provide the type of service for which a need has been shown" (69th Annual Report of the Interstate Commerce Commission at page 132), the need for amendment [fol. 231] of the Act was brought to the fore by the decision of the Supreme Court in *United States* v. *Contract Steel Carriers,* 350 U.S. 409 (1956). There the Commission had directed the contract carrier to cease operations as a common carrier, basing its order in part, upon the fact that the carrier, by active solicitation, had secured sixty-nine contracts to serve shippers. In affirming the three-judge district court which had reversed the order, the Supreme Court disapproved the Commission's specialization test insofar as it sought to limit the number of shippers which a contract carrier could serve. Although not specifically ruling upon the use of the test as a whole, the Supreme Court found that "if specialization is to be read into 49 U.S.C., Section 303(a)(15) by the legislative history, it is satisfied here since appellee hauls only strictly limited types of steel products under individual and continuing contractual agreements with a comparatively small number of shippers throughout a large area." Ibid at 411.

Following this decision, the Commission caused bills to be introduced in Congress, H.R. 5123 in the House of Representatives, and S. 1384 in the Senate. These measures, identical in their provisions, would have amended Section 203(a)(15) to redefine contract carriage as follows:

> "The term 'contract carriage by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce for compensation * * * * under continuing contracts with one person or a limited number of persons for the furnishing of transportation services of a special and individual nature required by the customer *and not provided by common carriers.*" (Emphasis added)

Section 209(b) was to be amended by providing that a contract carrier permit could be issued only upon a showing "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown."

The inclusion of these clauses in the proposed amendments resulted in sharp opposition; and extensive hearings before the Senate Subcommittee are reported in a 358-page [fol. 232]volume entitled "Surface Transportation—Scope of Authority of ICC—Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce, United States Senate, Eighty-Fifth Congress, First Session." (No. 92433 U.S. Government Printing Office, Washington, 1957). During the hearings, the Commission proposed to delete the objectionable language in Section 209(b); i.e., "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown," inasmuch as this would impose a "very difficult burden of proof" on applicants. After hearings, the House drafted an entirely new bill, and the Senate Committee released a drastically amended version of S. 1384. Although both bills were virtually identical, S. 1384 was finally enacted as Public Law 85-163.

Section 203(a)(15) of the Act, 49 U.S.C.A., 303(a)(15) as amended August 22, 1957, reads as follows:

> "The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer."

Section 209(b) of the Act (49 U.S.C.A., 309(b)) as amended August 22, 1957, reads as follows:

> "Applications for such permits shall be made to the Commission in writing, be verified under oath, and

shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to Section 210, a permit shall be issued to any qualified applicant therefore authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent author-
[fol. 233] ized by the permit will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. *In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the services proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements.* The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier, including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirements established by the Commission under Section 204(a)(2) and (6): Provided, That within the scope of the permit and any terms, conditions or limitations attached thereto, the carrier shall have the right to substitute or add to its equipment and facilities as the development of its business may require: Provided further, That no terms, conditions or limitations shall be imposed in any per-

> mit issued on or before the effective date of this proviso which shall restrict the right of the carrier to substitute similar contracts within the scope of such permit; or to add contracts within the scope of such permit unless upon investigation on its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in Section 203(a)(15), as in force on and after the effective date of this proviso." (Italics supplied, representing a portion of the new matter added to this section)

Thus while the Commission is still directed to issue a permit upon a finding that the proposed operation will be consistent with the public interest and the national transportation policy, in making this determination the Commission is now specifically required to consider and apply five statutory tests; namely, (1) the number of shippers to be served by the applicant, (2) the nature of the service proposed, (3) the effect which granting the permit would have upon the services of protesting carriers, (4) the effect [fol. 234] which denying the permit would have upon the applicant and/or its shipper, and (5) the changing character of that shipper's requirements.

With this legislative history in mind, we must determine whether the Commission acted within the scope of the statute in denying the application; and, if so, whether its findings are supported by substantial evidence, viewing the record as a whole.

Plaintiff urges that the effect of the Commission's decision is to apply the very standard first proposed in the amendments and subsequently withdrawn. With this contention we agree.

While the Commission apparently concedes that it no longer may deny a contract application upon the ground that applicant has failed to sustain the burden of proving that common carriers are "unwilling or unable" to perform the proposed service, it contends that in all instances under Section 209(b) it is proper to consider the "adequacy of existing services" in making a determination upon an application for new services. However, we are convinced that in determining whether a denial of the permit would

adversely affect the shipper in this instance, the Commission gave improper consideration to U.S.A.C.'s *willingness and ability* to perform, and that it further erred in conceiving its responsibility under Section 209(b). The Commission goes beyond the language and scope of the statute when it assumes and requires:

(a) That applicant carries the burden of showing that existing services are inadequate; and

(b) That the expressed "willingness and ability" of opposing carriers, together with absence of proof that such service has been tried and found wanting, ipso facto vitiates a contention that the service is "needed" by shipper, or that denial of the application will have an adverse effect upon shipper.

Subsequent decisions of the Commission in contract carriage proceedings demonstrate rather forcibly that the [fol. 235] Commission applied the "willing and able" test herein, and that it continues to pursue this course. In *Carolina Haulers, Inc., Contract Carrier Application*, No. MC-116825 (April 28, 1958) 76 M.C.C. 254, 256, we find the Commission stating:

> "*If sound economic conditions are to be maintained in the industry and a strong transportation system developed, existing available motor carriers*, before being deprived of desirable and needed traffic which they are able to handle efficiently, *must be shown to be unwilling or unable to meet the shipper's reasonable transportation needs.*" (Emphasis supplied)

In *Leo Holt, Jr., Extension—Pilings*, No. MC-85087 (July 14, 1958) 77 M.C.C. 141 at page 144, this language is noted:

> "Although both motor-carrier protestants are common carriers, there is no convincing evidence that applicant would provide any service to the supporting shipper which these protestants are *unable or unwilling* to provide * * * * We conclude that applicant has failed to sustain his burden of showing a need for the proposed service." (Emphasis supplied)

In *Wagner Contract Carrier Application*, No. MC-117010 (October 23, 1958), 77 M.C.C. 777, at page 781, it was stated:

> "We have held repeatedly that the existing motor carriers are entitled to all authorized traffic that they can handle economically and efficiently, before a new competing service may be authorized therefor, unless it can show that such existing carriers are *unwilling or unable* to meet the public's reasonable transportation needs within the authorized territories." (Emphasis supplied)

In *Roy D. Yiengst Common Carrier Application*, No. MC-117308 (April 17, 1959), 79 M.C.C. 265 at page 268, the Commission, in denying the petitioner's application as a *common carrier* for a certificate of *public convenience and necessity*, used language almost identical to that just quoted in the *Wagner* contract carrier application:

> "We have held repeatedly that the existing motor carriers are entitled to all authorized traffic that they can handle adequately and efficiently before a new competing service may be authorized therefor, in the absence, as here, of any showing that the existing carriers are unwilling or unable to provide needed service within the authorized territories."

In *E. L. Reddish Contract Carrier Application*, No. MC-117391 (June 30, 1959), 81 M.C.C. 35, at page 40, the Com-[fol. 236] mission, in citing its opinion here as authority for denial of the application, ruled upon applicant's contention that the willingness and ability of common carriers to provide the service should be given little weight by stating, "these issues were there (in the J-T case) resolved in a manner contrary to that urged by applicant; and it was found that the availability of common-carrier service is a relevant matter which must be considered in disposing of contract-carrier application."

As to the statements quoted in *Wagner* and *Yiengst*, supra, compare the 1939 statement of the Commission in

*William Heim Cartage Company, Inc., Extension—Indianapolis*, 20 M.C.C. 329, supra, at page 332:

> "The Commission has consistently stated that it is its belief that, in order to foster a sound transportation system, existing motor carriers should normally be accorded the right to transport all traffic which they can handle adequately, efficiently, and economically in the territory served by them, as against any person now seeking to enter the field of motor-carrier transportation * * * *."

It is conceded that the purpose of the new legislation was to give the Commission more helpful standards than were contained in the present law. Certainly the burden of proving a contract carrier operation to be consistent with the public interest and the national transportation policy was not eliminated by the 1957 amendment.[1] The stand-

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[1] The National Transportation Policy, 49 U.S.C.A., note preceding Section 301, enacted September 18, 1940, provides as follows:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of the Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the

ards of meeting this responsibility were changed, however, and as we read the statute these standards do not involve [fol. 237] a showing that common carriers are unwilling or unable to handle the traffic; or, stated otherwise, that common carrier service is inadequate. Under old Section 209(b), the only statutory requirement to qualify as a contract carrier was that the transportation be performed under individual contracts, and there was no limitation on the number of contracts. There was nothing to prevent a contract carrier, once it obtained a permit, from aggressively searching for new business within the limits of his permit, even though the authority may have been granted originally on the basis of the support of a single shipper.

The new sections sharply redefine contract carriage and give the Commission power to limit the number of contracts which a contract carrier can maintain. The Commission acquired the power to limit the service of the contract carrier to the shipper or shippers supporting the application. Congress set forth specific criteria to be considered, and deleted the test previously applied by the Commission involving a determination of adequacy of existing common carrier service.

[fol. 238] Defendants suggest that the specific criteria enumerated in the statute are not exclusive, but are only guides to be considered "among other things" in the context of the public interest and the national transportation policy. Of course the ultimate determination is whether or not a proposed contract carrier operation is consistent with the public interest and the national transportation policy. In making this determination, however, the Commission is directed specifically to consider five definite criteria. When the Commission injects a sixth criterion, specifically rejected by Congress, it clearly has erred.

The Commission by its orders found that plaintiff fulfilled the statutory requirements for a "contract carrier by motor vehicle" as prescribed by Section 203(a)(15). In applying the criteria prescribed by Congress in Section

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Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

209(b), the Commission correctly found that plaintiff met the requirements of the first and second tests, and, by implication, the fifth test. The decisive questions here involve the third and fourth criteria, requiring a consideration of the effect which granting the permit may have upon the services of protesting carriers, as well as the effect which denying the permit would have upon the applicant and its shipper.

Consideration of the effect on the services of protesting carriers does not contemplate consideration of the mere existence or availability of a protesting carrier, but rather what effect, if any, granting a permit would have on the existing services of that carrier. The Commission bases its decision here on the presumption that if an existing common carrier is able and willing to perform services for the shipper or, stated alternatively, that existing common carrier service is adequate, the effect on existing protesting common carrier services is adverse. Thus, since the [fol. 239] Commission aids itself by a presumption, under this interpretation the "very difficult burden of proof" remains with the applicant and proposed shipper to negate the adverse effect on existing common carriers. The effect of this is to inject precisely the standard which was deleted by Congress at the time of enactment of the new section.

The consideration of the effect on the services of protesting carriers is designed to afford a measure of protection for those carriers. This criterion does not contemplate consideration of the mere existence or availability of a protesting carrier, but rather what effect, if any, granting of a permit would have on the services of the carrier. If the protesting carrier was actually serving a shipper and participating in the traffic involved, the granting of a permit would divert traffic from the protesting carrier, and if this diversion would cause the services of the protesting carrier to be adversely affected to a material degree, this element certainly should be considered by the Commission. Where, however, the protesting carrier is not participating in the traffic involved, there can be no diversion of traffic and hence ordinarily there would be no adverse effect on the services of the protesting carrier.

The fourth criterion involves a consideration of the effect which denying a permit would have on the applicant

and/or its shipper. This provision quite obviously was inserted in order to protect the shipper and the applicant, and to insure that their interests would receive the same consideration and be weighed in the same balance as those of opposing carriers. And to a notable degree, this provision emphasizes the new distinction required by Congress between a common carrier certificate of public convenience and necessity, and the contract carrier's permit.

[fol. 240] It is quite clear that the Commission has entirely misconceived the purport of the 1957 amendments, and its function and duty with regard to the criteria set out in Section 209(b). The Commission continues to cling to its old tests and reasoning, and Congress has decreed otherwise.

The statute now contemplates two forms of motor carrier service. And quite obviously and clearly, under the statute a contract carrier's permit cannot be limited and restricted to cases where no common carrier service is available. Now an element of shipper's service has been affirmatively recognized by Congress, and here it is quite clear that the proposed contract carrier service is designed to meet the distinct particular needs of Boeing and that in its operation it has met that need. Under the statute a shipper is entitled to have his distinct needs met. In carrying out this new philosophy of motor carrier service, Congress has clearly indicated that the Commission must recognize contract carrier service as a form of transportation applicable when the special needs of each service are considered, under the national transportation policy.

The new statute says that a permit *shall* be issued if it appears that the applicant is fit, willing and able to perform, and that the proposed operation will be consistent with the public interest and the national transportation policy. Note that this does not say that grounds for a certificate of public convenience and necessity must exist. Note further that the criteria set out in Section 209(b) are factors to be considered. The term "considered" may be defined in this connection as weighed or balanced. This does not mean necessarily, that because an applicant fails to meet affirmatively all five of the standards or tests prescribed by Congress, the Commission is warranted in [fol. 241] rejecting the application. It must be recognized

that Congress intended to and did by the contract carrier provisions of the statute establish a complementary system of motor transportation insofar as this was possible as a matter of consistency with the public interest and the national transportation policy declared in the Act.

Thus, in weighing these various factors, one against the other, we reach the conclusion that even though the Commission may find that issuance of a permit will in fact adversely affect a protesting carrier, that in and of itself does not necessarily justify a denial of the permit. The statute does not say, "The permit shall be issued, unless an existing carrier will be adversely affected." It does set out clearly and concisely the standards by which the Commission must be guided, and there is no longer a need to resort to special tests beyond the language of the statute, which may have been necessary in making determinations prior to the amendments. The five criteria in Section 209(b) are broad and inclusive, and when given proper application, in light of the evidence, the Commission should, without the injection of other factors, be able to make a proper disposition of the application.

We conclude that decisions turning solely on the "adequacy-willingness and ability" test cannot be justified and are clearly erroneous. There can be no doubt that this case was decided by the Commission on that basis. Nothing in the record before us warrants a denial of the application on any other grounds. Here a distinct need of an individual customer for specialized service and equipment was shown. A shipper desired it and asked for it, and within the scope of the revised definition of a contract carrier, the shipper's desires and the applicant's ability to meet them have achieved substantial pertinence.

Since the order denying the application must be vacated, we observe further that apart from the fact that a finding [fol. 242] of an adverse effect upon U.S.A.C. would not in and of itself justify a denial of the application, there is in this record no substantial evidence to support the Commission's finding that the issuance of the permit would adversely affect the *services* of U.S.A.C. which had never handled or transported the commodities in question. Since U.S.A.C. is not participating in the traffic and never has been, the permit cannot possibly divert such traffic. There

is no evidence in the record that if the permit is denied, U.S.A.C. or any other existing carrier will ever be permitted to serve the needs of Boeing. And in this connection it should be noted that in reaching the conclusion that the shipper will suffer no adverse effect because U.S.A.C. is willing and able to perform, the Commission has entirely ignored the affirmative evidence of Boeing's specific need for a contract type service and the special problems it faces. No consideration was given to the special services which in fact could not be supplied by a common carrier. The Commission has neatly solved the problem with its finding that common carrier service is "adequate". Inasmuch as the "willing and able" test at times seems indistinguishable from, and in the eyes of the Commission, synonymous with, the "adequacy test", a finding by the Commission that existing common carrier service is "adequate to meet the reasonable transportation needs" of the shipper fails to take into account that the new test under Section 203(a)(15) is whether the service is "designed to meet the *distinct need* of each individual customer." While existing *specialized services* of common carriers may very well be adequate to supply the shipper's "*reasonable transportation needs*", that existing service may not in fact meet the *distinct* or *specific* need of the supporting shipper.

We conclude that to the extent the Commission has ruled that the burden is on applicant to show the protesting common carriers are unable or unwilling to meet the shipper's [fol. 243] reasonable transportation requirements, the standard is not supported by the language of Section 209(b), whether it goes under the guise of an "adequacy test" or otherwise. It in effect injects into the Act the very qualifications and limitations suggested by the deleted portions of the amendment. The Commission may not rule that the proposed service fails to qualify as contract carriage under Section 203(a)(15) inasmuch as the service is, or may be "provided by common carriers." Neither may the Commission deny a permit under Section 209(b) because the applicant has failed to establish that existing common carriers are "unwilling or unable to provide the type of service for which a need has been shown."

We conclude generally that to the extent that the Com-

mission has attempted to apply substantially the same tests for determining public convenience and necessity as it relates to common carriage to the narrowly restricted language of the statute relating to consistency with the public interest as it applies to contract carriage, the action is not supported by the language of Section 209(b).

It is of interest to note that at one time the Commission recognized a difference in the standards of proof required to show consistency with the public interest incident to a contract carrier's permit, as compared to the certificate of public convenience and necessity required for a common carrier. Earlier, it was required that once a contract carrier applicant had established a prima facie case, there was some burden on the protestants to come forward with evidence in rebuttal. See *Jason W. House Contract Carrier Application*, 1 M.C.C. 725. At about the same time the Commission held that the availability of adequate common carrier service alone did not preclude the granting of a contract carrier authority. See *T. J. Broom Contract Carrier Application*, 1 M.C.C. 425; *Howard W. Juett Contract* [fol. 244] *Carrier Application*, 1 M.C.C. 268. Clearly the effect of the amended statute is to restore these procedures to a degree, and to give emphasis to the shipper's preference, which underlies the special concept of contract carriage in any case. And it is clear that under the narrow definition of contract carriage found in the new law, there is no occasion, necessity or warrant for the same standards of proof in both applications.

The Commission cites many of its own rulings since the 1957 amendments under the well established theory that contemporaneous construction of a statute by those charged with its execution is entitled to great weight and should be affirmed unless clearly erroneous. However, the construction of a statute is a matter ultimately for the Courts to determine. Where the Commission's construction is clearly erroneous, the rule contended for does not apply. See *Woods* v. *Benson Hotel Corporation*, 177 F. 2d 543, (8th Cir. 1949); *Texas & Pacific Ry. Co.* v. *United States*, 289 U.S. 627; *Mid-Continent Petroleum Corp.* v. *N.L.R.B.*, 204 F. 2d 613 (6th Cir. 1953), certiorari denied, 346 U.S. 856.

Plaintiff urges that we compel action by the Interstate Commerce Commission unlawfully withheld upon the appli-

cation of plaintiff, and requests that we direct the Interstate Commerce Commission to issue to plaintiff a permit authorizing it to perform the transportation recommended by the Examiner. We have no such authority. Courts of review have no power to order an administrative body to perform discretionary acts in a particular manner, or themselves to exercise administrative functions. See *Interstate Commerce Commission* v. *Waste Merchants Association*, 260 U.S. 32; *Work* v. *Rives*, 267 U.S. 175; *Federal Power Commission* v. *Idaho Power Company*, 344 U.S. 17.

In the final analysis the Commission has the responsibility for determining what is best for the public interest and the national transportation policy, weighing the [fol. 245] various criteria that Congress has provided. The most that the courts may require is that all relevant factors be weighed carefully and fairly, and in this case, that no application be brushed aside upon the ground that an existing carrier wishes to perform the service. Again we emphasize that under the present statutory scheme, the shipper, the contract carrier and the common carrier all have coordinate interests; that there are now at least two forms of motor carrier service entitled to equal recognition, and that the interests of each must receive a fair consideration in reaching a determination which is consistent with the public interest and the policy of Congress with reference to national transportation.

For the foregoing reasons judgment will be entered setting aside the orders of the Interstate Commerce Commission and declaring them unlawful and void, and remanding the case to the Commission for further proceedings consistent with the rulings expressed here.

[fol. 246] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

Civil Action No. 12497

J-T TRANSPORT COMPANY, INC., Plaintiff,

and

CONTRACT CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC., AND AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC., Intervening Plaintiffs,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Defendants,

and

U.S.A.C. TRANSPORT, INC., REGULAR COMMON CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC., AND COMMON CARRIER CONFERENCE—IRREGULAR ROUTE, OF AMERICAN TRUCKING ASSOCIATIONS, INC., Intervening Defendants.

NOTICE OF APPEAL OF INTERSTATE COMMERCE COMMISSION TO THE SUPREME COURT OF THE UNITED STATES—Filed October 6, 1960

I

Notice is hereby given that the Interstate Commerce Commission, one of the defendants in the above-entitled civil action, appeals to the Supreme Court of the United States from the final judgment entered in this action on August 9, 1960. This appeal is taken pursuant to 28 U.S.C. 1253 and 2101(b).

II

The Clerk of the District Court will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

[fol. 247] 1. Complaint of the plaintiff, filed August 21, 1959, with its Appendices "A", "B", "C", "D", and "E".

2. Order of Court of September 25, 1959, granting leave to the Contract Carrier Conference of American Trucking Associations, Inc., to intervene as a plaintiff.

3. Complaint of Contract Carrier Conference, intervening plaintiff, filed October 2, 1959, with its Appendices "A" and "B".

4. Order of Court of October 19, 1959, granting leave to U.S.A.C. Transport, Inc., to intervene as a defendant.

5. Answer by intervening defendant U.S.A.C. Transport, Inc., filed October 19, 1959, to complaint of the plaintiff.

6. Answer, filed October 20, 1959, by defendants United States of America and Interstate Commerce Commission to complaint of plaintiff.

7. Order of Court of October 21, 1959, for filing and exchange of opening and reply briefs.

8. Answer, filed November 3, 1959, by intervening defendant U.S.A.C. Transport, Inc., to complaint of intervening plaintiff Contract Carrier Conference.

9. Answer, filed November 10, 1959, by defendants United States of America and Interstate Commerce Commission, to complaint of intervening plaintiff Contract Carrier Conference.

10. Order of Court granting leave to Regular Common Carrier Conference of American Trucking Associations, Inc., to intervene as a defendant.

11. Answer, filed on or about November 10, 1959, by intervening defendant Regular Common Carrier Conference of American Trucking Associations, Inc., to complaint of the plaintiff.

12. Order of Court of November 23, 1959, extending times for filing and exchange of opening and reply briefs.

13. Order of Court granting leave to Common Carrier Conference—Irregular Route, of American Trucking Associations, Inc., to intervene as a defendant.

[fol. 248] 14. Answer, filed on or about November 30, 1959, by intervening defendant Common Carrier Conference—Irregular Route, of American Trucking Associations, Inc., to complaint of the plaintiff.

15. Order of Court granting leave to Aerospace Industries Association of America, Inc., to intervene as a plaintiff.

16. Complaint of intervening plaintiff Aerospace Indus-

tries Association of America, Inc., filed on or about December 9, 1959.

17. Answer, filed on or about December 14, 1959, by intervening defendant Regular Common Carrier Conference of American Trucking Associations, Inc., to complaint of intervening plaintiff Contract Carrier Conference of American Trucking Associations, Inc.

18. Answer, filed on or about December 21, 1959, by intervening defendant U.S.A.C. Transport, Inc., to complaint of intervening plaintiff Aerospace Industries Association of America, Inc.

19. Order of Court of December 29, 1959, extending time for parties to file and exchange reply briefs.

20. Answer, filed on or about January 15, 1960, by defendants United States of America and Interstate Commerce Commission, to complaint of intervening plaintiff Aerospace Industries Association of America, Inc.

21. Notice by the Court, dated January 29, 1960, of scheduled hearing before Division One of the Court on February 15, 1960.

22. Plaintiffs' Exhibit "A", received in evidence at hearing before the Court on February 15, 1960, being a certificate by the Secretary of the Interstate Commerce Commission, dated February 10, 1960, with respect to portions of the record before the Interstate Commerce Commission in Docket No. MC-11185 (Sub-No. 102), entitled J-T Transport Company Extension—Indianapolis, Inc., [fol. 249] and Docket No. MC-11185 (Sub-No. 100), entitled J-T Transport Company Extension—Columbus, Ohio, together with the portions of the record thus certified.

23. Opinion of the Court, filed August 9, 1960.

24. Judgment of the Court, filed August 9, 1960.

25. This notice of appeal.

III

The following questions are presented by this appeal:

1. Whether the District Court erred in holding that by the 1957 amendments to Sections 203(a)(15) and 209(b) of the Interstate Commerce Act Congress intended to require the Interstate Commerce Commission to grant a motor contract carrier permit without regard to the fact that existing

motor common carriers are able and willing to provide adequate service to the shipper.

2. Whether the District Court erred in holding that Section 209(b) of the Interstate Commerce Act, which requires the Commission to consider "the effect which granting the [contract carrier] permit would have upon the services of the protesting carriers," refers only to the diversion of traffic from a protesting carrier who is actually serving the shipper, and does not permit consideration of the loss of potential traffic by a protesting carrier who is able and willing to serve the shipper.

3. Whether the District Court erroneously concluded that the Interstate Commerce Commission, in denying an application for a motor contract carrier permit, had placed upon the applicant the burden of proving that the services of existing carriers are inadequate.

4. Whether the District Court erred in holding that the 1957 amendments to Section 209(b) made exclusive the five factors which the Commission was directed to consider, and [fol. 250] precluded its consideration of other factors, in determining whether a grant of a contract carrier permit would be consistent with the public interest and the national transportation policy.

/s/ Robert W. Ginnane, General Counsel. /s/ James Y. Piper, Assistant General Counsel Attorneys for the Interstate Commerce Commission, Washington 25, D. C.

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[fol. 250a] Proof of Service (omitted in Printing)

[fol. 251] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

Civil Action No. 12497

J-T TRANSPORT COMPANY, INC., Plaintiff,

and

CONTRACT CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC., AND AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC., Intervening Plaintiffs,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Defendants,

and

U.S.A.C. TRANSPORT, INC., REGULAR COMMON CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC., AND COMMON CARRIER CONFERENCE—IRREGULAR ROUTE, OF AMERICAN TRUCKING ASSOCIATIONS, INC., Intervening Defendants

NOTICE OF APPEAL OF U.S.A.C. TRANSPORT, INC., ET AL., TO THE SUPREME COURT OF THE UNITED STATES—Filed October 7, 1960

I. Notice is hereby given that U.S.A.C. Transport, Inc., Common Carrier Conference—Irregular Route, of American Trucking Associations, Inc., and Regular Common Carrier Conference of American Trucking Associations, Inc., intervening defendants in the above-entitled matter, hereby appeal to the Supreme Court of the United States from the final judgment entered in this action on August 9, 1960.

This appeal is taken pursuant to 28 U.S.C. 1253 and 2101(b).

II. Intervening defendants adopt the request concurrently made by the Interstate Commerce Commission for preparation and transmission to the Clerk of the Supreme Court of the United States the transcript of record in this cause, embracing within the adoption each item designated by the Interstate Commerce Commission to be included, and, as well, this notice of appeal.

[fol. 252] III. The following questions are presented by this appeal:

1. Whether the Interstate Commerce Commission is now required by law to grant to a motor contract carrier applicant therefor a permit regardless of the existence of motor common carriers able and willing to provide the considered service.

2. Whether in interpreting Section 209(b) of the Interstate Commerce Act requiring the Commission to consider "the effect which granting the permit would have upon the services of the protesting carriers" the District Court erred in holding that the test relates only to diversion of traffic presently enjoyed in serving the affected shipper and excludes consideration of diverting potential traffic which the protesting carriers are willing and able to transport.

3. Whether the District Court erred in concluding that the Interstate Commerce Commission, in its denial of a permit to applicant, placed upon applicant the burden of proving inadequate the services of existing carriers.

4. Whether the District Court erred as a matter of law in limiting the factors which the Commission may consider in granting or denying a contract carrier application so that only the factors enumerated in the 1957 amendments to Section 209(b) are relevant.

Paul F. Sullivan, James K. Knudson, 1821 Jefferson Place, N. W., Washington 6, D. C.

Carll V. Kretsinger, 1014-1018 Temple Bldg., Kansas City, Missouri, Attorneys for U.S.A.C. Transport, Inc.

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Lee Reeder, 1012 Baltimore Building, Kansas City 5, Missouri, Attorneys for Common Carrier Conference—Irregular Route, of American Trucking Associations, Inc.

John S. Fessenden, Roland Rice, 618 Perpetual Building, 1111 E Street, N. W., Washington 4, D. C.

[fol. 252a] John F. Edell, 6155 Oak Street, Kansas City 13, Missouri, Attorneys for Regular Common Carrier Conference of American Trucking Associations, Inc.

CERTIFICATE OF SERVICE (omitted in Printing)

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[fol. 253] Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 254] SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1960

Nos. 563 and 564

INTERSTATE COMMERCE COMMISSION, Appellant,

vs.

J-T TRANSPORT COMPANY, INC., ET AL.;

and

U.S.A.C. TRANSPORT, INC., ET AL., Appellants,

vs.

J-T TRANSPORT COMPANY, INC., ET AL.

ORDER NOTING PROBABLE JURISDICTION—February 20, 1961

Appeals from the United States District Court for the Western District of Missouri.

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of two hours is allowed for oral argument.

February 20, 1961

Mr. Justice Whittaker took no part in the consideration or decision of these cases.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1961 999078 1139